Supreme Court, U. S.
FILED
JUN 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. .....

76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BURT PINES, *City Attorney,*
EDWARD C. FARRELL, *Chief Assistant City Attorney for Water and Power,*
J. DAVID HANSON, *Deputy City Attorney,*
DAVID J. OLIPHANT, *Deputy City Attorney,*
By DAVID J. OLIPHANT, *Deputy City Attorney,*
111 North Hope Street, P.O. Box 111,
Los Angeles, Calif. 90051,
Attorneys for Defendants-Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Citations to Opinions Below 2

Jurisdiction 3

Questions Presented 3

Statutes and Rules Involved 4

Statement of the Case 4

Reasons for Granting the Writ 9

I. The Court of Appeals Decided This Federal Question in Direct Conflict With the Supreme Court's Decision in General Electric Co. v. Gilbert 9

A. The Will of Congress on Pay Differentials 10

B. Will of Congress on Administrative Interpretations 17

II. The Decision of the Court of Appeals Presents an Important Federal Question Which Has Nationwide Impact on the Pension, Annuity and Insurance Industry, as Well as on Cities and States 25

III. An Award of Back Contributions From a Local Government Entity and the Permanent Injunction Is in Excess of the Court's Jurisdiction as Limited by Title VII and by Article III and the 10th, 11th and 14th Amendments of the United States Constitution 28

Conclusion 35

INDEX TO APPENDICES

Page

Appendix A. Fair Labor Standards—29 U.S.C. § 206 ..... App. A-1

42 U.S.C. § 2000e-2. Unlawful Employment Practices A-2

42 U.S.C. § 2000e-5(g) A-4

Appendix B. Memorandum and Order Granting Plaintiffs' Motion for Preliminary Injunction B-1

Findings of Fact B-9

Conclusions of Law B-11

Appendix C. Opinion of the Court of Appeals for the Ninth Circuit C-1

Appendix D. Opinion of the Court of Appeals Denying Rehearing D-1

Kilkenny, Circuit Judge Dissenting D-4

Letter to West Publishing Company for Changes in Opinion Dated May 3, 1977 ..... D-10

Revised: May 5, 1977 ..... D-12

Appendix E. Legislative and Administrative History of Acts E-1

I.

The Equal Pay Act E-1

II.

Title VII of Civil Rights Act E-6

III.

Administrative Authority and Interpretations .. E-11

IV. Page

1972 Congressional Action E-16

V.

Legislative Intent vs. Interpretive Bulletin in Employer Costs E-20

Appendix F. Charter Sections 220.1(1)(a) and (g) F-1

TABLE OF AUTHORITIES CITED

Cases	Page
American Nurses Assoc. et al. v. Board of Governors of the University of North Carolina et al. (USDC Mid. D. N. Carolina C 75-558-G)	27
Ammons v. Zia Co., 448 F.2d 116 (10th Cir. 1971)	11
Bailey v. Los Angeles County (75-3863 C.D. Cal.)	27
Califano v. Goldfarb, ... U.S. ...., 45 USLW 4237 (1977)	7
Corning Glass Works v. Brennan, 417 U.S. 188, 41 L.Ed.2d 1, 94 S.Ct. 2223 (1974)	7, 28, 30
Craig v. Boren, ... U.S. ...., 50 L.Ed.2d 397 (1976)	7
Diana L. Spirt v. TIAA-CREF (N.Y., S.D. 74 Civ. 1674)	27
Dred Scot v. Sanford, (1856) 19 How. 393, 15 L.Ed. 691	32
Edelman v. Jordan (1974) 415 U.S. 651	31
EEOC v. Colby College (Maine D.C. S.D. 75-136)	27
Espinoza v. Farah Mfg. Co., 414 U.S. 86, 38 L.Ed. 2d 287, 94 S.Ct. 334 (1973)	26
Fitzpatrick v. Bitzer, 427 U.S. 445	32
Garland M. Fitzpatrick v. Frederick Bitzer, 427 U.S. 445 (1976)	28
Geduldig v. Aiello (1974) 417 U.S. 484, 41 L.Ed. 2d 256, 94 S.Ct. 2485	7, 29

	Page
General Electric Co. v. Gilbert, ... U.S. ...., 50 L. Ed.2d 343, 97 S.Ct. ...., 45 USLW 4031 (1976)	2, 3, 8, 9, 10, 15, 16, 17, 18, 20, 21, 24, 36
Henderson v. Oregon, 405 F.Supp. 1275 (1975)	5, 27
Henry v. City of Los Angeles, 201 Cal.App.2d 299,	30
Houghton v. Long Beach, 164 Cal.App.2d 298 (1958)	30
International Brotherhood of Teamsters v. United States, et al., ... U.S. ....., 45 L.W. 4506 (1977)	13
Kahn v. Shevin, 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1734 (1974)	7, 28
Lauf v. E. G. Skinner & Co., 303 U.S. 323 (1938)	34
Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803)	31
McCardle, Es Parte (U.S., 1869) 7 Wall. 506, 19 L.Ed. 264	33, 35
National League of Cities v. Usery (1976) 426 U.S. 833, 49 L.Ed.2d 245, 96 S.Ct.	30
Peters et al. v. Wayne State University et al. (Mich. E.D. 670-165)	27
Rosina Smith et al. v. County of Los Angeles (Cal. C.D. 74-253)	27
Schlesinger v. Ballard (1975) 419 U.S. 498, 42 L.Ed.2d 610, 95 S.Ct. 72	28, 29

Page

Schultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970) cert. den. 398 U.S. 905 .....11, 29

Sheldon v. Sill (U.S. 1850) 8 How. 440, 12 L.Ed. 1147 .....33, 35

Skidmore, et al. v. Swift & Co., 323 U.S. 134 (1944) 18

Stanton v. Stanton, 421 U.S. 7, 95 S.Ct. 1373 (1975) 7

United States v. Stapf, 375 U.S. 118, 84 S.Ct. 248, 11 L.Ed.2d 195 (1963) 19

Federal Register

30 Federal Register 14926, 14928, Dec. 2, 1965, Sec. 1604.7 21

40 Federal Register 24135, June 4, 1975 17

40 Federal Register 57980, 57982 26

Miscellaneous

110 Congressional Record 7218, 5803, 5437, 7477 34

House Report, p. 7152 13

Regulations

Code of Federal Regulations, Title 29, Sec. 800.116 (d) (1975) 16

Code of Federal Regulations, Title 29, Sec. 1604.9 (f) (1972) 20

Code of Federal Regulations, Title 29, Sec. 2610 .. 26

Code of Federal Regulations, Title 29, Sec. 2611 .. 26

Code of Federal Regulations, Title 41, Secs. 60-20.3 (c)(1970) 17

Statutes Page

California Government Code, Sec. 45342 .....27, 30

California Statutes of 1937, Chap. 3, Resolutions, p. 2627 30

Civil Rights Act of 1964, Title VII, Sec. 703(a) (e)(h) 4

Civil Rights Act of 1964, Title VII, Sec. 706(g) 4

Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e 2

Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-2, Title VII, Sec. 703 4

Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-2, Title VII, Sec. 703(h) 10, 14

Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-2(e) 4

Equal Pay Act of 1963 (Pub. L. 88-38, 77 Stat. 56), Sec. 3 4

Fair Labor Standards Act, (77 Stat. 56), Sec. 6(d) 10

Los Angeles City Charter, Sec. 220.1 30

Los Angeles City Charter, Sec. 220.1(1)(a)(g) .. 4

Pension Reform Act of 1974, P.L. 93-406, 88 Stat. 829, Secs. 302-305 26

United States Code, Title 26, (IRC 1954), Sec. 410 26

United States Code, Title 28, Sec. 1254(1) 3

United States Code, Title 29, Sec. 206(a)(1) 14

Page

United States Code, Title 29, Sec. 206(d)(1) 4, 7, 11, 28, 30

United States Code, Title 42, Sec.2000e-2(a) 4, 35

United States Code, Title 42, Sec. 2000e-5 25

United States Code, Title 42, Sec. 2000e-5(g) ..4, 36

United States Constitution, Art. I 31

United States Constitution, Art. II, Sec. 3 .....23, 33

United States Constitution, Art. III 3, 28, 31, 33, 36

United States Constitution, Tenth Amendment ..... 3 .....28, 32, 36

United States Constitution, Eleventh Amendment 3, 28, 36

United States Constitution, Fourteenth Amendment 3, 25, 28, 29, 31, 32, 35, 36

United States Constitution, Fourteenth Amendment, Sec. 5 .....28, 29, 33

IN THE

Supreme Court of the United States

October Term, 1976
No. .....

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on November 23, 1976, as to which rehearing was denied, with dissenting opinion, on April 18, 1977. That decision affirmed the granting of summary judgment by the United States District Court for the

Central District of California in favor of respondent plaintiffs on a cause of action alleged under Title VII of the Civil Rights Act of 1964, as amended in 1972 [42 U.S.C. §2000e *et seq.*].

The first opinion of the Court of Appeals preceded by just two weeks the decision of this honorable Court in *General Electric Co. v. Gilbert*, ... U.S. ...., 50 L.Ed.2d 343, 97 S.Ct. ...., 45 USLW 4031 (1976). The Court of Appeals rejected the legislative history that this honorable Court expressly relied on in *General Electric*. Such legislative history would directly control this case even if *General Electric* had not been decided. Petitioners filed for a rehearing on the day the *General Electric* decision was announced. A divided Court of Appeals denied rehearing. Judge John F. Kilkenny, dissenting, stated in part:

> "I am convinced that the legal principles enunciated in *General Electric Co. v. Gilbert*, ... U.S. .... (Dec. 7, 1976), are here controlling and that the district court erred in granting a summary judgment against the appellants. At a minimum, the court should have conducted a trial on the issue of whether the appellants' retirement plan was justified on the basis of recognized actuarial tables showing the difference in longevity between males and females." (App. D-4.)[1]

Citations to Opinions Below.

The findings and conclusions on summary judgment and opinion on the injunction of the United States

---

[1]Citations to "App. A-1, B-1, C-1" etc., are to pages of the Appendices to this Petition.

District Court for the Central District of California reported at 387 F.Supp. 980, are printed as Appendix B. The opinion of the United States Court of Appeals for the Ninth Circuit (not yet officially reported) affirming the judgment of the District Court, is printed as Appendix C. The opinion of the Court of Appeals denying rehearing, with dissenting opinion, is printed as Appendix D.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 23, 1976, and amended December 23, 1976. Petitioners' timely petition for rehearing was denied on April 18, 1977.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented.

1. Where females receive the same monthly pension benefits as do males, but for longer life expectancies than males, do Title VII and the Equal Pay Act prohibit different pension plan contributions for females and males?

2. In deciding the above question, did the Court of Appeals properly follow the opinion of the Supreme Court in *General Electric Co. v. Gilbert*?

3. May the lower courts adopt a rule of law requiring a municipal employer to pay higher compensation to females than m[illegible] in view of the jurisdictional limitations of Title VII, t[illegible]qual Pay Act, and Article III and the 10th, 11th [illegible] 14th [illegible]endments of the United States Constitution?

Statutes and Rules Involved.

Involved herein are Section 3 of the Equal Pay Act of 1963 (Pub. L. 88-38, 77 Stat. 56), 29 U.S.C. §206(d)(1); and Sections 703(a)(e)(h) and 706(g) of Title VII of the Civil Rights Act of 1964, as amended in 1972 (the Equal Employment Opportunity Act of 1972), 42 U.S.C. §2000e-2(a), (e), (h) and §2000e-5(g), the texts of which are printed in Appendix A hereto. A summary of legislative history of the Equal Pay Act, Title VII and the 1972 amendments is printed in Appendix E. The Charter of the City of Los Angeles, a state law, §220.1(1)(a)(g) is printed as Appendix F.

Statement of the Case.

This case was brought under Title VII of the Civil Rights Act as amended in 1972 (hereafter "Title VII"), claiming a violation of Section 703 of the Act (42 U.S.C. §2000e-2).

Plaintiffs are civil service employees of the City of Los Angeles Department of Water and Power and as such are members of a compulsory retirement Plan of such City Department (hereafter referred to respectively as the "Plan" and the "Department").

The Plan provides for several kinds of pension benefits at the employee's option. The most common is a "formula pension". Such formula is a monthly payment equal to 2% of average monthly salary paid during the last year of employment times the number of years of employment. This monthly benefit is guaranteed for life. It is a vested right of the employee.

Because women outlive men, the total amount paid as pension to a woman is greater than that paid to a man.

For clarity, this Plan should be contrasted with those pension systems which pay men and women the same *total* pension benefits during their respective life spans, but pay women smaller monthly pension amounts. See, *e.g., Henderson v. Oregon,* 405 F.Supp. 1275 (1975), on appeal in the Ninth Circuit.

The two systems may be analogized to loaves of bread accrued at the date of retirement. In the *Henderson* system, women receive the same size loaf as men but because the life expectancy is longer, the monthly "slices" received by a woman are smaller than those received by a man. In contrast, under the Department's Plan, women are to receive the same size "slice" of bread each month after retirement but because they live longer they must have a longer loaf in order to pay all the "slices".

To fund the Plan, the employees and the Department contribute thereto. To fund the "longer loaf" payable to females, higher contributions are necessarily required for women than for men. Although contributions made by the women themselves were *slightly* higher than the contributions made by men, the Department also contributed disproportionately more for women than for men.

Further, since each employee has an absolute right to the return of all his or her contributions, plus a vested pension right, the present worth of all compen-

sation paid to female employees is higher than the present worth of all compensation paid to male employees.

The following table shows an example of the present value at age 30 of pension benefits of a male and a female; and the present value of contributions necessary to fund a formula pension for each, retirement being at age 65.

	Male	*Female*
1. Age hire	30	30
2. Monthly salary during career	$1,000	$1,000
3. Monthly allowance at 65	700	700
4. Present Value of Pension discounted at 5½% interest and 1951 GA Mortality Table:	9,257	11,886
5. Monthly employee contribution to Plan	22.20 (x 1.1484=	25.49
6. Department's 110% monthly matching contribution	24.42	28.04
7. Present value (at age 30) of contributions to fund above pension at 5½% and 1951 table:		
a) Member Contribution	4,069	4,743
b) Department's 110% matching	4,476	5,217
c) Additional Department contribution	712	1,926
d) Total Department contribution	5,188	7,143

The contributions by the Department for a woman employee were always greater than for a corresponding man. The total amount of compensation for a woman was greater than for a corresponding man.

The plaintiffs herein contended in the trial court that differential contributions by men and women were *per se* illegal. The trial court erroneously held that even *rational* differentiation was illegal if related to sex:

"In short, under the Equal Employment Opportunity Act of 1972, all stereotypic treatment of persons based on . . . sex whether *rational or irrational* is dead."

(Emphasis added) (App. B-7) (This Court has never held that gender-based differentiations are *per se* illegal.)[2]

The District Court enjoined requiring larger contributions from females and ordered payment of prior "excess contributions" with interest to be paid to plaintiffs forthwith. The effect of this decision is to require a City to compensate its female civil service employees at an even higher rate than males.

Your petitioners appealed contending that by relying on a 1972 EEOC "guideline" as if it were a regulation, the trial court failed to exercise its explicit statutory responsibility to impartially and independently interpret the law *de novo,* and that in all events the "guideline" was contrary to Title VII and the Equal Pay Act. Your petitioners contended that they had committed no unlawful employment practice and that the decision penalized the employer and discriminated against men, by requiring the employer to compensate women at a higher rate than men.[3]

Similarly, to attempt to lump males and females together as in a so-called "unisex table" would necessarily result in males' contributions subsidizing the females'

---

[2]*Kahn v. Shevin,* 416 U.S. 351, 40 L.Ed.2d 189, 94 S. Ct. 1734 (1974); *Stanton v. Stanton,* 421 U.S. 7, 95 S.Ct. 1373, 1377 (1975); *Geduldig v. Aiello,* 417 U.S. 484, 495, 41 L.Ed.2d 256, 94 S.Ct. 2485 (1974); *Craig v. Boren,* ..... U.S. ....., 50 L.Ed.2d 397 (December 20, 1976); *Califano v. Goldfarb,* ..... U.S. ....., 45 USLW 4237 (March 2, 1977).

[3]The Equal Pay explicitly prohibits this. "[A]n employer who is paying a wage rate differential in violation of this subsection shall *not,* in order to comply with the provisions of this subsection, reduce the wage rate of any employee." [29 U.S.C. §206(d)(1), Appendix A-1.] (Emphasis added.) To raise the "wage rate" as to women generally, "reduces" the wage rate as to men by comparison. See *Corning Glass Works v. Brennan,* 417 U.S. 188, 207, 41 L.Ed.2d 1, 17, 94 S.Ct. 2223 (1974).

benefits, and would consequently discriminate against males (see footnote 4, Court of Appeals Dissent, App. D-13). It's like having men and women *appear* to contribute to equal size "loaves" but then taking part of the loaf of the shorter-living men, to pay "slices" to the longer-living women.

The Court of Appeals repeated the errors of the trial court. Even when the *General Electric* opinion was issued, a majority failed to recognize those errors.[4] Such ruling undermines this Honorable Court's authority and nullifies its holding and reasoning in *General Electric Co.* It interferes with sovereign authority, and establishes an erroneous nationwide precedent for pension, annuity and insurance plans, mandating discrimination against males, and preferential compensation for females.

Additionally, the holdings of the lower courts confer on the agencies lawmaking powers that Congress specifically determined *not* to grant, which Congress specifically intended the agencies not exercise, and which this Court in *General Electric* said the agencies did not have. Your petitioners were thereby effectively deprived of an impartial *de novo* determination of issues of law and fact, which Congress specifically intended your petitioners be afforded by *independent* determination of the courts.

---

[4]We believe footnotes 17 and 18 (*General Electric, supra,* 50 L.Ed.2d 343, 356-357) specifically demonstrate the error of the Court below and met the precise issues raised by this case.

REASONS FOR GRANTING THE WRIT.

I. The Court of Appeals Decided This Federal Question in Direct Conflict With the Supreme Court's Decision in General Electric Co. v. Gilbert.

In its initial opinion, the Court of Appeals took a position which was to prove directly contrary to the Supreme Court in *General Electric Co. v. Gilbert,* 1976, ... U.S. ....., 50 L.Ed.2d 343. Then, when the *General Electric* case came down two weeks later, the majority of the Court of Appeals refused to follow it.

The majority's decision below is directly contrary to the Supreme Court in the following particulars:

1. It fails to follow the will of Congress as to pay differentials as found by the Supreme Court in *General Electric.*

2. It results in the court below abdicating its responsibility to render impartial *de novo* judgment by improperly deferring to administrative interpretations of the Equal Employment Opportunity Commission (hereinafter "EEOC") which were rejected by the Supreme Court in *General Electric.*

3. It departs from the long standing meaning of "discrimination" in the Constitutional sense. The Supreme Court in *General Electric* rightly indicated it was not the intent of Congress to depart from that meaning in adopting the "sex" provisions of Title VII. (*General Electric, supra,* ..... U.S. ....., 50 L.Ed.2d 343, 356-357, fn 18, and 360.)

4. It fails to permit the use of actuarial tables to afford equality of treatment in employment under a city's benefit plan, which the Supreme Court in

General Electric indicated was permissible so long as not a mere pretext to effect invidious discrimination. (*General Electric, supra,* ..... U.S. ....., 50 L.Ed.2d 343, 351 and 355-356.)

A. The Will of Congress on Pay Differentials.

Congress never intended to prohibit the payment of different compensation to males and females when that differential was for a factor other than sex, even though the factor might be directly correlated with sex.

The Court recognized this in *General Electric,* ..... U.S. ....., 50 L.Ed.2d 343, 358-359) when it determined that the Bennett Amendment to Title VII [§703(h) of the Civil Rights Act, 42 U.S.C. §2000e-2 (h)] permitted denial of disability benefits for pregnancy, a condition correlated with a sex classification. But even if this Court had not reached that conclusion, the legislation requires it.

"Differentiation upon the basis of sex" is not *ipso facto* unlawful. The Bennett Amendment to Title VII provides that it shall *not* be an unlawful employment practice for an employer to "differentiate upon the basis of sex" for purposes of employee compensation "if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act" [42 U.S.C. §2000e-2(h)].

Such Section 6(d) was added to the Fair Labor Standards Act by the Equal Pay Act of 1963 (77 Stat. 56). Section 6(d) provides that employers may not discriminate between employees in compensation on the basis of sex "*except* where such payment is pursuant to (1) a seniority system (2) a merit system (3) a system which measures earnings by quantity or

quality of production, or (iv) a differential *based on any other factor other than sex*" [29 U.S.C. §206(d)(1)] (Emphasis added).

It is the payment differential based on an "other factor other than sex" which Congress thus inserted in both Acts to allow differences in compensation for factors such as pension payment or pension cost differentials based on different longevity. (See Dissent Op. at App. D-4.)

The pertinent legislative history of the Equal Pay Act and Title VII is detailed in Appendix E, and summarized below.

1. *Equal Pay Act.* In enacting the Equal Pay Act, The 88th Congress specifically intended that employers might continue to differentiate upon the basis of sex for compensation purposes so long as the classification involved actual or good faith differences as the basis for the differences in pay and was not a mere subterfuge to pay women less. The concept was equal pay for equal work. The House Committee noted, for example, that an employer might pay male packagers and female packagers differently where there were real and not merely nominal differences as the basis for the different pay. If the male packagers were required to lift heavy boxes and the female packagers were not, more compensation might be paid to the male packagers. Previous cases have so understood the Equal Pay Act. *Schultz v. Wheaton Glass Co.,* 421 F.2d 259 (3d Cir. 1970) *cert. den.* 398 U.S. 905; *Ammons v. Zia Co.,* 448 F.2d 116 (10th Cir. 1971).

Congress also specifically intended that the employer would not be required to classify men and women

in the *same* way if to do so would penalize the employer by requiring direct or indirect payment of more for work done by one class ("women") than for the same work done by the other class ("men"). (App. E-1.)

The House Committee rejected the administration's bill which would have prohibited differentiation on the basis of sex.

To ensure the result it intended, the House adopted statutory exceptions which were to be not merely "defenses" but were rather "exemptions from the operation of the statute." (App. E-1, 2.) The Committee Report stated that it was only prohibiting those pay differentials that were based *solely* on sex, and that it had provided the three specific exceptions and one broad general exception to operate as "exemptions" from the Act. Thus, the broad general exception for "any other factor other than sex" was meant to permit classification by sex for purposes of different compensation if there were some other factor other than sex (*e.g.*, lifting heavy packages as opposed to light packages or differences in other costs in employing women), that was the basis of the pay differential.

The controlling legislative history demonstrates it was not the intent of Congress to require the employer to pay women more than men, but only to prohibit paying women less when there was no rational basis for the differential. Longevity and the cost of funding for it was an "other factor" specifically recognized by both houses. (App. E-4 fn.2.)

The Senate history shows the same intent. The Senate Committee bill provided only the broad exclusion in its bill. Its report stated that the broad exception would

be allowed not only in the specific cases the Committee mentioned but also where "an employer will be economically penalized by the elimination of a wage differential." The House history shows the House likewise intended such as part of the broad exception (App. E-3, 4.) The Senate adopted the House bill as better expressing its intent. (App. E-5.)

2. *Title VII.* In enacting Title VII, the same 88th Congress always intended to legislatively treat discrimination on account of "sex" differently than discrimination on account of "race or color." After it was proposed to add "sex" to the bill in the House, the one serious argument advanced in favor of such amendment was that the Amendment was necessary to ensure the "color-blind" impact of the law among *women* in the labor market. After the "sex" amendment was passed, the House then added "sex" as a bona fide occupational qualification (without objection of any member). In contrast the House explicitly rejected an amendment to make "race or color" a bona fide occupational qualification. (App. E-6.)

When the House Bill (HR 7152) reached the Senate, questions were raised by Senator Dirksen and others as to the possible conflict with the Equal Pay Act.

Interpretive Memoranda[5] were introduced to the effect that classification by sex "where there is a rational basis" was *not* prohibited; and further that the standards of the Equal Pay Act would be applicable even under Title VII of the House Bill. (App. E-8.) This interpretation was given as to the House Bill, *before* Senate amendments enacted these points into express law.

---

[5]This Honorable Court also relied on such Memoranda in *International Brotherhood of Teamsters v. United States, et al.*, ... U.S. ....., 45 L.W. 4506, 4513 (May 31, 1977).

An amendment in the nature of a substitute bill (Amendment No. 1052) was then introduced by Senators Dirksen, Humphrey, *et al.* It provided that *three* of the Equal Pay Act exceptions would also be exceptions to the Title VII prohibitions—differentials based on a good faith merit system, quantity and quality of work or seniority system. (42 U.S.C. §2000e-(h); A-3; 29 U.S.C. §206(a)(1); App. E-8).

The *fourth* exception of the Equal Pay Act and its general policy were expressly adopted by the Bennett Amendment. The manner in which the amendment was adopted demonstrates the intent.

Prior to the introduction of the Dirksen-Humphrey substitute, Senator Bennett proposed to amend the pending House Bill. Thereafter, both Senator Dirksen and Senator Humphrey expressly accepted the Bennett proposal as an amendment to *their* proposal in the nature of a substitute bill. All three Senators explained the effect of so accepting the Bennett Amendment. Senator Dirksen explained that the pending amendment recognized those exceptions that were carried in the earlier Act. (App. E-9.)

The Senate then voted to substitute the language of the Humphrey-Dirksen bill (as amended by the Bennett Amendment) for the language of the House bill. Such bill was then the pending business and subject to amendment.[6]

---

[6]Proper procedure requires of course that an amendment in the nature of a substitute be voted on "twice". "Even if the [amending] paragraph constitutes the entire resolution and the motion to substitute is adopted, it is necessary then to vote on adopting the resolution as amended since it has only been voted to substitute one paragraph for another." Roberts' Rules of Order (rev. ed.), p. 142. This procedure protects the right of an individual to vote in favor of substituting the language of proposal "B" in preference to proposal "A", and then to vote against enacting "B" as law.

Senator Humphrey was specifically asked about the impact of the pending bill on retirement systems. Senator Randolph, who asked the question, had been co-author of the Senate subcommittee's equal pay bill. Senator Humphrey was the floor manager of the pending civil rights bill and had introduced the Senate Committee equal pay bill on the Senate floor. He also had expressly accepted the Bennett Amendment to clarify the intent of the Humphrey-Dirksen bill. In answer to Senator Randolph's question Senator Humphrey said that accepting the Bennett Amendment made it unmistakably clear that "*differences of treatment in industrial benefit plans,* including earlier retirement options for women, may continue in operation under this bill if it becomes law." (Emphasis added.) (See *General Electric, supra,* 50 L.Ed.2d 343, 359.)

The House thereafter adopted the Senate bill. In so doing it specifically affirmed this intent. (App. E-10, 11.)

When we set forth to the Court below the intent of the law as expressed by Senator Humphrey, the Court improperly rejected it as an "erroneous interpretation". (App. C-17, 18.) After this Honorable Court relied on Senator Humphrey's views as expressing the intent of the law (*General Electric, supra,* 50 L.Ed.2d 343, 359) the Court of Appeals still failed to follow that intent. Thus, while both Congress and the Supreme Court had indicated the proper administration of the Bennett Amendment and the specific legislative intent, the Court of Appeals ignored them both.

Its rationale on rehearing was the *further* erroneous conclusion of law that this Honorable Court in the *General Electric* case did *not* exercise its impartial judgment on legislative intent but relied "more heavily" on "finding" a conflict between interpretations of the Wage and Hour Administrator and the EEOC, and therefore deferred to the Wage and Hour Administrator instead of the EEOC to decide *General Electric*. Such rationale besides being incorrect, was also an egregious error of law as to the Courts' responsibility and the effect to be given administrative interpretations.

While this Honorable Court in *General Electric* recognized the conflicts, the majority below chose to find no conflict. (Compare the comments of the Dissent noting clear conflicts among the agencies and internal inconsistency within the rulings of the EEOC, App. D-7, 8). Although legislative intent was clear the lower courts "deferred" completely to a contrary administrative "interpretation".

What the majority below ignored was the fact that this Honorable Court exercised its independent, impartial judgment as to legislative intent and found that the Bennett Amendment allowed pay differentials for an "other factor other than sex" although the factor was correlated with sex, *e.g.*, pregnancy. In support of that position, this Honorable Court recognized that "longevity" was another "other factor other than sex" which could be the basis for differential compensation and *was already accepted as such* by the Wage and Hour Administrator of the Department of Labor. 29 CFR §800.116(d) (1975). (General Electric, *supra*, 50 L.Ed.2d 343, 359; see Dissent at D-7.)

The lower courts refused to accept 29 CFR §800.116 (d) (1975) as administrative recognition of sex-correlated longevity as a factor other than sex allowing pay differentials.

Yet, until this case, *everyone* has understood the administrative bulletin to mean that longevity was an "other factor other than sex" which would warrant pay differentials by the employer.

For example, as recently as 1975 the Secretary of Health, Education and Welfare said:

> "Accordingly [the Secretary] continues to follow the Executive Order regulations in requiring that fringe benefit plans provide *either* equal periodic benefits to members of each sex *or* equal contributions by the employer for members of each sex. . . ." (vol. 40 Fed. Reg. p. 24135, June 4, 1975) (emphasis added). (See also similar ruling by Office of Federal Contract Compliance, 41 CFR §60-20.3(c) (1970).)

Given greater female longevity it is impossible to have *equal* periodic benefits unless either the females or the employer or both contribute more for females, or the males subsidize the females. These rulings thus implicitly recognize the fact that longevity is a factor other than sex for which differential compensation may be paid to the sexes.

Congress enactment of the Pension Reform Act also recognizes this fact. (See p. 26 *infra.*) For the Court of Appeals to refuse to recognize longevity as an "other factor other than sex" and to rule that a pay differential based thereon is prohibited is a failure to give effect to the law as enacted by the Congress, and as interpreted by this Court in *General Electric*.

B. Will of Congress on Administrative Interpretations.

In its original opinion the Court of Appeals *also* found conflicts among administrative interpretations.

(App. C-19.) In its subsequent opinion the majority could "find" no inconsistency. (App. D-3.) Thus the holding of the latter decision seems to be that lower courts may use fluctuating and conflicting interpretations of administrative interpretations as the basis for rejecting both the decision of this Honorable Court and explicit Congressional intent in enacting the law.

Such view is contrary to this Court's holding in *General Electric,*—that the courts shall independently and impartially construe the statute. It is also contrary to specific legislative intent to the same effect, which intent would be controlling even if *General Electric* had not been decided. Further the *content* of the specific administrative interpretation relied on in the *second* Court of Appeals' decision contradicts the statutory language and explicit legislative history. Finally, in giving effect to one of the conflicting administrative interpretations in order to hold *against* the defendant, the Court of Appeals gave an effect thereto directly *opposite* to Congressional intent, as to the effect to be given *any* administrative intrepretation.

In enacting the Equal Pay Action, the 88th Congress was well aware of the *Skidmore* decision construing the Fair Labor Standards Act. (*Skidmore, et al. v. Swift & Co.,* 323 U.S. 134 (1944); See App. E-12-13.) In view of that decision, Congress acted specifically to ensure that administrative interpretations not be given the status of "interpretive regulations" and not be used *against* the defendant. They are not to be used as a substitute for the court's impartial judgment on matters of law or on matters of fact. One basic reason for so limiting the administrator was to ensure that the will of Congress as expressed in the statute

be given effect, and that any broader interpretations by a partisan administrator not be substituted therefor. (App. E-13.)

In considering legislative intent it is as important to see what Congress rejected as what it enacted.

In the 88th Congress, the equal pay bill proffered by the Administration would have given the administrator authority to issue "legislative regulations". Congress determined not to give either that authority *or* the authority to issue "interpretive regulations". Congress expressly limited his authority to interpretative bulletins, which "have no other significance, except that *if an employer relies on this interpretative bulletin, he is protected.* He is not in violation if he has done something in reliance upon those interpretative bulletins . . ." (App. E-13.) (Emphasis added.)

Under the Equal Pay Act, the Secretary is a prosecutor. As a Prosecutor, the Secretary has inherent authority to inform the public what cases he will prosecute, and Congress expressly recognized that *inherent* authority. However Congress specifically intended that the Secretary's interpretations could be used in court only as a shield by the defendant, and not as a policy-making sword in the hands of the administration (App. E-13.)

It is well established that the weight (if any) "to be given to interpretative rule varies with its statutory and administrative context. . . ." *United States v. Stapf,* 375 U.S. 118, 127 n. 11, 84 S.Ct. 248, 255, 11 L.Ed.2d 195 (1963). And here Congress intended that bulletins be given no weight in the scales of justice *against* a defendant, but only in defendant's favor.

It is significant that in 13 years under the Act, no employer so far as we know, has been prosecuted either for paying different pension benefits to men and women *or* for requiring different contributions from men and women, based on longevity.

Even if the Secretary were to issue a new bulletin saying that Labor was going to prosecute plans requiring differential contributions such bulletin would be entitled to "no standing in court," as a matter of legislative intent. (App. E-13.) The defendant would be entitled to rely as a defense, on the plain meaning of the previous administrative bulletin, just as the Supreme Court relied on the plain meaning of such bulletins in *General Electric*. Finally, the question would be not whether the defendant violated any bulletin but whether the statute had been violated. The Legislature has directed that the Secretary show that the exceptions do *not* apply. On that issue the defendant is entitled to the impartial decision of the court. To give effect to a position advocated by the Secretary because previously published in a bulletin denies the defendant an impartial determination by the Court that Congress intended the defendant have.

However, in the instant case five days before oral argument in the Court of Appeals, an attorney for the Secretary of Labor filed an "amicus" brief urging the court to disregard the plain meaning of its bulletins on *pensions*. Instead, the "amicus" urged that a *different* bulletin was now "controlling" and it should now be construed so that *it* did not conflict with a post-1972 EEOC position. That new EEOC position was that a retirement plan had to have equal benefits *and* equal employee contributions (29 CFR §1604.9(f) (1972);

compare prior position 30 F.R. 14926, 14928 Dec. 2, 1965, Section 1604.7).

Obviously the latter is impossible *unless* women as a matter of law must be paid more compensation; the several administrative positions are irreconcilable. (See Dissent, App. D-7, D-8.)

The issue of law, however, is the intent of Congress and *not* whether there is unanimity among administrative interpretations. By giving "deference" to a supposed *lack* of conflict among some of the administrative interpretations, the lower court failed to exercise its constitutional and statutory responsibility to independently and impartially determine Congressional intent. *General Electric* clearly holds the courts should *not* so abdicate their responsibility. Further, the specific Congressional intent under both the Equal Pay Act and Title VII is that the courts, not the administrative agencies, should be the law-interpreting body.

Moreover, even where an agency has express Congressional authority to issue "legislative regulations", a defendant may challenge a regulation on the ground that it is invalid because inconsistent with the statute and the intent of Congress. Obviously where such a challenge is raised, the agency's interpretation of the law as expressed by its regulation is *not* the measure of the intent of the law. For the Court of Appeals to have rejected the legislative history which showed the law's intent, as an "erroneous interpretation" of the law's intent, and to do so *based on* newly advanced *administrative* interpretations, was not only fallacious but also denied your petitioners a hearing and determination on one of the precise issues of law your peti-

tioners raised, namely that the content of the administrative interpretation was not in accordance with the statute and its intent.

On that issue, the language of the Bennett Amendment and the legislative history of the equal pay bills flatly contradict the content of the administrator's bulletin that the majority relied on in its second opinion below. The Bennett Amendment says "it shall *not* be an unlawful employment practice . . . *to differentiate upon the basis of sex* in determining the amount of the wages or compensation paid or to be paid. . . ." (Emphasis added.) On the equal pay bills, the Senate Committee Report said that under the single broad exception provided in its bill, wage differentials based on employer cost differentials were not outlawed. In the House, specific legislative history likewise shows the same express intent not to prohibit differentiation by sex as to wages and costs. (App. E-4.) The House bill, noted Senator Dirksen, better expressed Senate intent and was thereafter adopted by the Senate. (App. E-4.)

In sharp contrast to this statutory language and clear history that "to differentiate upon the basis of sex" is not *ipso facto* unlawful, the bulletin of the Secretary says that compensation differentials may not be based on cost differentials because (it says) a comparison of cost differentials upon the basis of sex is *ipso facto* unlawful because differentiation upon the basis of sex is *ipso facto* unlawful. (App. E-18.) This contradicts the statute and the bulletin on pensions. Yet this is the bulletin the majority relied on in denying rehearing. (App. D-3.)

The bulletin is not faithful to the law. It would seem that even the *issuance* of that bulletin by the Secretary exceeds the *constitutional* authority of the executive branch which is *constitutionally* charged "to take care that the laws be *faithfully* executed." (Const. Art. II, §3.)

For the Court of Appeals to *rely* on such bulletin not only exalts the agent over the principal, when the principal has expressly stated that the agents' interpretations shall have no standing in court except as a defense for the defendant, but it also implies to the executive branch that it is "above the law", that it has no duty to be faithful to the laws Congress enacts, that it need not take care regarding the will of Congress, but may instead follow the dictates of its own will.

The Legislature directed that the Secretary must show that a pay differential is *not* based on an "other factor other than sex," or any other statutory exception. For the Court of Appeals to "rely" on the administrator's interpretation that compensation differentials may not be based on employer cost differentials is tantamount to a repeal of *all* the statutory exceptions, since all depend on cost. It says not only are there no exemptions but also that the courts will *hear* no defenses. It is to adopt the erroneous rationale of *one* bulletin of the administrator (that differentiation by sex is prohibited by the statute), when the statute on its face and its legislative history states the exact opposite.

By hypothesis, *any* pay differential would rest in part on differences in other costs as its practical justification. So if costs correlated to sex differentiation were no justification for a pay differential correlated to

sex, there would be no statutory exceptions. But Congress expressly stated and intended the contrary.

Finally, this Honorable Court has relied on bulletins to hold in *favor* of defendant in *General Electric,* but the court below relied on a bulletin to hold *against* defendant. This also was contrary to congressional intent.

Moreover, as recently as 1972 Congress specifically rejected proposals to grant the EEOC quasi-legislative and quasi-judicial authority, *and* rejected proposals to define unlawful discrimination more broadly.

Having failed in the Legislature, the EEOC then issued new "guidelines" post-1972 and sought as an "amicus" in both courts in the instant case to have the *courts* adopt those new interpretations as defining prohibited conduct under the statute.

The success of this improper action by the EEOC is shown by the fact that the District Court made an express finding that the EEOC "amended its regulations" in 1972, and the District Court based its judgment on such "amended regulation." (App. B-10-12.)

The EEOC had similar success in the Court of Appeals. While this Court explicitly pointed out in *General Electric* that "guidelines" are *not* regulations, even the Dissenting Opinion expressly referred to them as "regulations." (App. D-8.)

The EEOC is a prosecutor. But it has clothed itself with authority it does not have, which this Court has plainly said it does not have, and yet which the lower courts persist in erroneously assuming that it does have, all to the injury of your petitioners.

In fact, Congress in 1972 declined to grant such authority to the agency, based on its finding that the

agency was not impartial, but an advocate of policies beyond those which Congress chose to enact into law. (App. E-16-17.)

For the lower courts to give effect to "guidelines" as if they were impartial pronouncements above the highest court and the Constitution was to act in excess of the courts' own jurisdiction as conferred by statute. (42 U.S.C. §2000e-5, App. A-4.) Congress expressly limited that jurisdiction in enacting Title VII in 1964. It expressly reaffirmed certain of those limitations in 1972. App. E-16.)

The jurisdictional limitations of the statute contemplate that the courts give effect to the statute both in respect to what conduct is prohibited and in respect to the *absence* of quasi-legislative and quasi-judicial authority in the agency. For the lower courts to have disregarded the Congressional intent on either point is to act outside their own jurisdiction as expressly limited by the statute. It also denies to the Petitioners that right to an *impartial* determination of issues that both the Constitution *and* the statutes guarantee. As to your individual petitioners it is a denial of due process of law guaranteed by the 14th Amendment.

II. The Decision of the Court of Appeals Presents an Important Federal Question Which Has Nationwide Impact on the Pension, Annuity and Insurance Industry, as Well as on Cities and States.

The funding of pensions, annuities and insurance plans depends upon an actuarial determination of aggregate risk, dividing the projected cost among the members of the group covered. This is universally done by the use of separate mortality tables for males and females because of the significant difference in life expectancy between females and males. For example,

a graph offered by amicus for respondents in the Court of Appeals, showed that given a sample of 100,000 males and 100,000 females who retire at age 65 and live through age 107, by the median age 83 where the two mortality curves intersect, 65,600 males will have died and only 48,800 females, 34,400 males would remain, and 51,200 females. This statistic means there would be 48% more females to provide retirement benefits for at age 83 than for the males at that age. In other words, beginning at age 65, and each year until age 83, more males die than females. Consequently more funds must be available to provide benefits to the larger number of females alive after that age.

The entire industry depends upon actuarial tables which thus separate males from females. Indeed, Congress under ERISA [Pension Reform Act of 1974, P.L. 93-406, 88 Stat. 829] set up three agencies for federal pension law enforcement, the Internal Revenue Service, the Department of Labor and the Pension Benefit Guarantee Corporation. Actuarial requirements are stressed under the Act [26 U.S.C. (IRC 1954) §410 *et seq.*, Act §§302-305]. The Pension Benefit Guarantee Corporation in December 1975 specifically set up no less than six such *sex-differentiated* tables for funding [40 F.R. 57980, 57982, 29 C.F.R. 2610, 2611]. The Court may properly look to recent Congressional action in the pension area to assist in its interpretation of other laws as applied to pension problems. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 38 L.Ed.2d 287, 94 S.Ct. 334 (1973). On the other hand there are to our knowledge no unisex mortality tables. (Dissenting Op., D-4.) Even if there were, their use would discriminate against males.

The decision of the Court of Appeals will have a heavy financial impact on retirement plans across the country. For example, in an affidavit filed in the New York case of *Diana L. Spirt v. TIAA-CREF* (N.Y., S.D. 74 Civ. 1674), the actuary estimated that changing that system alone (which involves equal contributions for unequal monthly benefits) to a unisex system, over the collective lifetimes of 100,000 retired males and 100,000 retired females would cost 2.3 *billions* of dollars. Whether a court orders equalizing monthly employee contributions or monthly benefits, the cost of the system must increase, not to mention the additional cost of refunds ordered. Cases in this area are now proliferating in the federal courts across the country. To name a few: *Spirt v. TIAA-CREF, supra; Henderson v. Oregon,* 405 F.Supp. 1271 (1975) on appeal in the Ninth Circuit; *Rosina Smith et al. v. County of Los Angeles* (Cal.C.D. 74-253); *Peters et al. v. Wayne State University et al.* (Mich. E.D. 670-165); *EEOC v. Colby College* (Maine D.C. S.D. 75-136); *Bailey v. Los Angeles County* (75-3863 C.D. Cal.); *American Nurses Assoc. et al. v. Board of Governors of the University of North Carolina et al.* (USDC Mid. D. N. Carolina C 75-558-G).

Your petitioners have been contacted by other public retirement systems which have either unequal contribution rates or unequal benefit rates based upon recognized actuarial tables. They await the outcome of this case to decide whether they must change their systems at great expense and face additional extensive liability for "back pay," as a result of complying with laws such as California Government Code §45342 which require actuarial soundness (See App. F).

The Court of Appeals, in a simplistic error, said that equalization could be arrived at by spreading the cost over all of the members. Aside from the fact that such discriminates against the male employees, it would be in violation of the Equal Pay Act. This Court held in *Corning Glass Works v. Brennan,* 417 U.S. 188, 207, 41 L.Ed.2d 1, 17, 94 S.Ct. 2223 (1974) that increasing the burden on one class of employees to provide "equal pay" for another class is in violation of the Equal Pay Act. (See also 29 U.S.C. §206(d)(1), A-1.)

To allow the decision below to stand will invite an unnecessary multiplicity of lawsuits to "equalize" benefits or contributions, or both; and to recover back contributions or increase future benefits, or both.

III. An Award of Back Contributions From a Local Government Entity and the Permanent Injunction Is in Excess of the Court's Jurisdiction as Limited by Title VII and by Article III and the 10th, 11th and 14th Amendments of the United States Constitution.

There are several major jurisdictional limitations exceeded by the decisions below.

The 1972 Amendments to Title VII were enacted by Congress pursuant to §5 of the Fourteenth Amendment which empowers Congress to enforce the Fourteenth Amendment by appropriate legislation. (*Garland M. Fitzpatrick v. Frederick Bitzer,* 427 U.S. 445 (1976).

The Honorable Court has construed the Due Process and Equal Protection provisions as not prohibiting classifications such as defendants' Plan where there is a rational basis therefor. *Kahn v. Shevin* (1974) 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1734; *Schlesinger*

v. Ballard (1975) 419 U.S. 498, 42 L.Ed.2d 610, 95 S. Ct. 72; *Geduldig v. Aiello* (1974) 417 U.S. 484, 41 L.Ed.2d 256, 94 S.Ct. 2485.

Similarly the statute on its face and its legislative history show that a classification related to sex "where there is a rational basis" (App. E-9) is *not* prohibited unless the plaintiffs show such is not in good faith or is a subterfuge. See *Schultz v. Wheaton Glass Co.,* 421 F.2d 259 (3d Cir. 1970) *cert. den.* 398 U.S. 905 (Dissent, D-9).

It cannot be supposed that Congress is empowered by Section 5 of the 14th Amendment to enact legislation *prohibiting* classifications that are *permitted* by the 14th Amendment. Hence if Congress had enacted a law prohibiting rational classifications or requiring irrational ones, it would be acting in excess of its 14th Amendment power.

Consequently, assuming *arguendo* that the trial court was correct that "rational" classification is prohibited (and irrational classification therefore required) by Title VII, it would follow necessarily that to that extent Congress acted in excess of its 14th Amendment power.

Such exercise of power would therefore have to be sustained, if at all, under some other grant of power—the commerce clause, for example.

But this Honorable Court has held that the Tenth Amendment is a limitation on the exercise of the commerce clause power in respect to cities. Such amendment provides that powers not delegated to the United States are reserved to the States, and the authority of Congress to regulate in a *manner* which invades local sovereignty is limited thereby.

Thus this Honorable Court has held that Congress may not regulate compensation of civil service employees. The court stated in *National League of Cities v. Usery* (1976) 426 U.S. 833, 49 L.Ed.2d 245, 253, 96 S.Ct. .....:

> "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the *matter,* but because the Constitution prohibits it from exercising the authority in that *manner.*" (Emphasis added.)

Management of the City Department's retirement plan is likewise a function of local government under state law (Charter §220.1, California Stat. 1937, Chap. 3, Resolutions, p. 2627). (App. F.) The City Charter Section 220.1, and similarly, California Government Code Section 45342, require that the Plan be maintained on a sound actuarial basis. Requiring refunds of previous contributions prior to retirement interferes with actuarial soundness in a manner not required by equal protection or due process.

Further, despite the Court's Opinion (App. C-24) that the Department could pass on the cost of refunds by increasing all contributions or lessening benefits, such is not permitted by State law or by the Equal Pay Act. (State Law) *Houghton v. Long Beach,* 164 Cal.App.2d 298, 306 (1958); *Henry v. City of Los Angeles,* 201 Cal.App.2d 299, 314; (Equal Pay Act) (*Corning Glass Works v. Brennan,* 417 U.S. 188, 207, 41 L.Ed.2d 1, 17, 94 S.Ct. 2223 (1974), 29 U.S.C. §206(d)(1)). The Department is penalized by

the decision because it must now reach into other city revenues to pay the difference. (See *Edelman v. Jordan* (1974) 415 U.S. 651, 653.)

It is likewise interfered with by the permanent injunction. Any legislation of Congress under either the Fourteenth Amendment or under the commerce clause, for example, which interferes with the authority of local governmental entities to establish pension plans for its civil service employees would be an invalid invasion of local sovereignty. So would a law requiring payment of higher compensation to female civil service employees than males.

For the same reasons, the permanent injunction of the lower court and its award of back contributions exceeds the limitations of the Tenth Amendment. Such amendment is a limitation on all the powers delegated to the United States, including the judicial power delegated by Article III, and not merely a limitation on those legislative powers that have been delegated to the Congress by Article I. As the Congress may not enact a law which interferes with local sovereignty, so the Court may not issue a decree which so interferes.

Assuming *arguendo* that by enacting Title VII Congress had enacted a law which required the payment of higher compensation to female civil service employees than to males, for the courts to give effect to such a law would exceed the constitutional limitations on the *courts'* power. The court may not so act. That was the precise holding of *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803). The Court held that it would *not* exercise a power (even though Congress purported to confer or acknowledge it) when to do so would have the effect of the Court exceeding

constitutional limitations upon it. The duty of the Court, the Chief Justice said, is to "read and obey" the law which *limits* the Court's power.[7]

For the same reasons dealing with the Tenth Amendment, we submit that there also is a violation of the Eleventh Amendment by the decisions below. In *Fitzpatrick v. Bitzer, supra,* 427 U.S. 445, 456, fn. 11, the Court noted that such challenge was not raised there. We have raised and do raise such a challenge.

There is another major jurisdictional limitation exceeded by the decisions below. Section 5 of the 14th Amendment gives the *Congress* the authority to enforce that article by appropriate legislation. That grant of authority is, we submit, exclusive. Especially where (as here) the Congress has *exercised* that authority, where it has enacted certain policies into law, it is not within the powers of either the executive or the judicial branch to give effect to *different* policies even for the purposes of "enforcing" the 14th Amendment. Any different view would lead to governmental chaos.

---

[7]A different view of judicial power was indicated by the infamous and erroneous *Dred Scott* decision more than half a century later. The latter view was that the Constitution gives "prerogative authority" to the Courts to "review" legislation. *Dred Scot v. Sanford,* (1856) 19 How. 393, 15 L.Ed. 691. In contrast, the rationale of Marshall, *C.J.* was that the Court did not have prerogative power; it would give effect to a law of Congress *unless* by so doing the Court would itself exceed some constitutional limitation, which limitations apply to the Court as well as to Congress. The *Dred Scott* decision was the second in history to nullify congressional action. In his first Inaugural Address, President Lincoln rejected the *Dred Scott* theory of the Court's power. The errors of *Dred Scott* have never been *judicially* acknowledged.

We have above noted the express jurisdictional limitation on the executive's following different policies. The executive is charged that "the laws be faithfully executed" (Art. II §3). The limitation of faithfulness likewise applies to any agent (such as EEOC) that is an agency of Congress, its principal.

Express limitations also exist with respect to the courts' authority. Congress has clear constitutional authority to specify the jurisdiction of the courts. Const. Art. III. *Sheldon v. Sill* (U.S. 1850) 8 How. 440, 12 L.Ed. 1147, *Ex Parte McCardle* (U.S., 1869) 7 Wall. 506, 19 L.Ed. 264.

Thus, where, as here, Congress has not only exercised the authority granted by Section 5 of the 14th Amendment, but has also limited the courts' jurisdiction under that statute to those "adverse *actions*" as are defined by the statute and are "intentionally engaged in", it is not within the courts' power to develop broader definitions of unlawful discrimination in terms of "systems or effects" or otherwise. In fact it was to prevent that possibility that led to adopting the jurisdictional limitation in 1964. While in 1972 it was proposed to permit the development of a broader definition of unlawful discrimination in terms of "systems and effects", that proposal was rejected and the jurisdictional limitations expressly reaffirmed. (App. E-15-18.)

Since 1972 the courts may now exercise broader *remedial* authority than under the 1964 statute, *after* it has been found that an "adverse action" as statutorily

defined has been "intentionally engaged in". However Congress in 1972 again precluded the courts from any "common-law-making" role in defining unlawful employment practices by express reaffirmations of the jurisdictional limitations of Title VII. (See App. E-16.)

Of course Congress may so limit the courts. "There can be no question of the power of Congress to define and limit the jurisdiction of the inferior courts of the United States." *Lauf v. E. G. Skinner & Co.,* 303 U.S. 323, 330 (1938).

The trial judge herein seemed unconcerned with the statutory language. He did not even make the findings which the statute requires as the condition precedent to the exercise of the courts' *remedial* jurisdiction under the statute (App. B-10-12), namely that the City was "intentionally engaging in" an unlawful employment practice as stautorily defined. The trial court likewise ignored the jurisdictional limitation on an award of "back pay"—that such shall not be awarded if the action of the employer was "for *any* reason other" than discrimination[8] on account of sex (App. A-5). These lapses of the trial court, plus its reliance on the EEOC "amended regulation" demonstrate that the

[8]There was extensive and careful attention given to the meaning of "discrimination" in the 1963-64 debates. The Congressional Record is very clear that although the *opponents* of the bill charged it had a new broad, sweeping meaning, the *proponents* of the bill whose intent is controlling said that it had the same well established meaning it already had under a number of already existing statutes. (110 Cong. Rec. 7218, 5803, 5437, 7477.)

trial court was not exercising its statutory *judicial* jurisdiction, but some new legislative jurisdiction.

That the Court may not act in excess of statutory jurisdiction (even if it had "enforcement" authority under the Fourteenth Amendment) is one of the foundations of the "checks and balances" of American government. See *Sheldon v. Sill* (U.S. 1850), 8 How. 440, 12 L.Ed. 114); *Ex Parte McCardle,* 7 Wall 506, 19 L.Ed. 264.

Conclusion.

Here, classification for purposes of the pension system does not adversely affect the "employment status" of any individual woman employee. While there is differentiation between men and women, upon the basis of sex there is no discrimination "*against*" an individual with respect to compensation because of sex. Therefore no adverse action or unlawful employment practice as defined by statute has been shown under either subsection of 42 U.S.C. §2000e-2(a).

Additionally Title VII specifically provides that it shall *not* be an unlawful employment practice to "differentiate upon the basis of sex in determining the amount of wages or compensation" if such differential in payment is for any "other factor other than sex." Here the factor was life expectancy or longevity. For the courts below to expand the definition of unlawful employment practices to prohibit differential payment for that factor where made on a rational basis, without any showing that such was done as a subter-

fuge and not in good faith, exceeded the courts' power as limited by Article III of the Constitution and Title VII, (42 U.S.C. §2000e-5(g)) in addition to violating the 10th, 11th and 14th Amendments.

Hence, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit or alternatively to command the Court below to re-examine its decision in the light of *General Electric Co. v. Gilbert,* the statutes, the legislative history, and the United States Constitution.

BURT PINES,
City Attorney,

EDWARD C. FARRELL,
Chief Assistant City Attorney for Water and Power,

J. DAVID HANSON,
Deputy City Attorney,

DAVID J. OLIPHANT,
Deputy City Attorney,

By DAVID J. OLIPHANT,
Deputy City Attorney,

Attorneys for Defendants-Appellees.

APPENDIX A.

Fair Labor Standards—29 U.S.C. § 206.

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

42 U.S.C. § 2000e-2.
Unlawful Employment Practices.

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor

organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

* * *

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discrim-

inate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

42 USC § 2000e-5(g).

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

APPENDIX B.

Marie Manhart et al., Plaintiffs, v. City of Los Angeles, Department of Water and Power, a body corporate and politic, et al., Defendants. Civ. No. 73-2272-HP.

United States District Court, C. D. California.

Jan. 15, 1975.

Female employees of city water and power department brought action challenging requirement that female employees make larger monthly contributions than their male counterparts in order to receive the same monthly retirement benefit as the male employees. Plaintiff moved for a preliminary injunction. The District Court, Pregerson, J., held that such practice violated the Equal Employment Opportunity Act notwithstanding that such differentiation was based on actuarial tables indicating that women as a class tend to live longer than men, that the Act requires that each person be treated as an individual and not on the basis of characteristics generally attributed to any racial, religious or sex group and that a preliminary injunction would issue.

Motion granted.

MEMORANDUM AND ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

PREGERSON, District Judge.

This matter arises upon a motion for preliminary injunction. Plaintiffs, Marie Manhart, Carolyn Mayshack, and other employees of the Los Angeles Department of Water and Power initiated this action against the Los Angeles Department of Water and Power be-

cause female employees of the Department are required to make larger monthly contributions than their male counterparts in order to receive the same monthly retirement benefits as these male employees. In plaintiffs' view, this practice violates § 703 of the Equal Employment Opportunity Act of 1972, 43 U.S.C.A. § 2000e-2 (West 1974). According to defendants, however, this differentiation between male and female employees is justified by actuarial tables which indicate that women as a class tend to live longer than men and that therefore female employees are likely to receive retirement benefits for a longer duration than their male counterparts. In short, defendants argue that women should pay more to get more.

In order to issue a preliminary injunction, the court must make the following determination: (1) that plaintiffs are likely to prevail on the merits, (2) that plaintiffs will suffer irreparable harm without preliminary relief, (3) that defendants will not be unduly injured by the injunction, and (4) that an injunction promotes the public interest. Seamen v. Spring Lake Park Independent School District No. 16, 363 F.Supp. 944, 945 (D.Minn.1973); United States v. Local 638, 337 F.Supp. 217, 220 (S.D.N.Y.1972). See King v. Saddleback Junior College Dist., 425 F.2d 426 (9th Cir. 1970).

The major question on this motion is whether plaintiffs have a reasonable likelihood of success on the merits. To make this determination, the court must decide whether the Department's practice of requiring women to make larger monthly contributions to the retirement plan than men constitutes "[discrimination] against any individual with respect to his compensation,

terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." within the meaning of § 703(a)(1) of the Equal Employment Opportunity Act of 1972. 42 U.S.C.A. § 2000e-2(a)(1) (West 1974).

Several sources of authority support the conclusion that the Department's practice in question here constitutes sexual discrimination under § 703(a)(1). Initially, it should be pointed out that this section applies to retirement plans. Bartmess v. Drewrys USA, Inc., 444 F.2d 1186 (7th Cir. 1971); Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3d Cir. 1973). Moreover, current regulations of the Equal Employment Opportunity Commission (EEOC) issued under the authority of § 713 of the Act, 42 U.S.C.A. § 2000e-12 (West 1974), not only suggest that § 703(a)(1) applies in this case, but also indicate that the Department's practice gives rise to sexual discrimination. According to these current regulations, "it shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other," 29 C.F.R. § 1604.9(e), and "it shall be an unlawful employment practice for an employer to have a pension or retirement plan . . . which differentiates in benefits on the basis of sex." 29 C.F.R. § 1604.9(f).

The EEOC has recently applied these standards to an analogous case in which retired female employees received lower monthly payments under their annuities than their male counterparts. Decision No. 74-118, CCH EEOC Decisions ¶ 6431 (Employment Practices Guide, 1974). Under the facts of that case, female employees had contributed the same amounts for the

annuity benefits as male employees. In rejecting the argument that equalization of monthly payments would discriminate against males, who, as a class, would receive less because they tend to die sooner, and in favor of females, who would receive more because they generally die later, the EEOC stated:

> A argues that equal payments to female retirees would in fact discriminate in their favor because females, statistically, live longer than men. The logic of this argument is that usually used to support discrimination: an appeal to the average characteristics of a particular sex, race, or other group protected under Title VII. But no person knows when he or she will die.
>
> * * *
>
> Thus we think that A's argument misses the point. All that A's sex-segregated actuarial tables purport to predict is risk spread over a large number of people; the tables do not predict the length of any particular individual's life.
>
> In our view, any use of sex-segregated actuarial table that results in payment of different periodic pension benefits to males and females is highly suspect. Because actuarial tables do not predict the length of any individual's life, any claim that such tables may be used to assure equal pension payments over a lifetime between males and females must fail. In order to achieve compliance with Section 703(a) of Title VII and with the Commission's Guidelines on Discrimination Because of Sex the periodic pension benefits paid to males and females in equivalent circumstances must be equal. Moreover, it would not be a defense to Charging Party's charge that equalizing males' and females' periodic pension benefits would result in higher costs to Respondents if indeed this were shown to be a fact. Guidelines on Discrimination Because of Sex, 29 CFR Sec. 1604.9(3). See, also, Taylor v. Goodyear Tire & Rubber Co., 5 EPD Para. 8545, 6 FEP Cases 50 (N.D.Ala., 1972).

(Footnotes omitted.) EEOC Decision 74-118, pp. 3-5.

As plaintiffs correctly point out, the only difference between the facts of EEOC Decision 74-118 and the facts of the case at bar is that instead of taking equal contributions from both sexes and supplying lower benefits to females, the defendants in the present action take more contributions from females and supply equal benefits to both sexes. In either case, the reason for this differential treatment is the actuarial fact of female longevity which, in effect, involves the application of characteristics that may be true of a class of people to individuals within the class for which the characterization may or may not be true. Therefore, EEOC Decision 74-118 is directly applicable to the present case, and dictates a finding of sexual discrimination here. As such, it is entitled to great deference in this court. Griggs v. Duke Power Co., 401 U.S. 424, 433-434, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

The conclusion that the defendants' differential treatment of female employees violates § 703(a)(1) is supported by a recent Harvard Law Review comment, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1172-1176 (1971). In its discussion of discrimination based on statistical differences and life insurance benefit pro-

grams, the comment takes the position that employers must provide the same life insurance benefits to male and female employees even though employers must pay higher premiums for males than for females due to actuarial female longevity. The comment reaches this conclusion because "Title VII, in the field of employment, requires evaluation on an individual basis rather than a prediction made on the basis of a sex-defined group," and because "Title VII focuses on presenting each employee in an individual light, free from conclusions that may be drawn from the individual's membership in one sex or the other." 84 Harv.L. Rev. at 1174.

The basic principle which emerges from these authorities and from the case law is that sexual discrimination under § 703(a)(1) exists whenever general fact characteristics of a sex-defined class are automatically applied to an individual within that class. See Phillips v. Martin Marietta Corp., 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971); Willingham v. Macon Telegraph Publishing Co., 482 F.2d 535 (5th Cir. 1973). In passing Title VII, Congress established a policy that each person must be treated as an individual and not on the basis of characteristics generally, and often falsely, attributed to any racial, religious, or sex group. See Rosenfeld v. Southern Pacific Co., *supra* 444 F.2d at 1225. More particularly, Congress intended in regard to sexual discrimination cases to strike at the entire spectrum of disparate treatment of individual men and women resulting from sex stereotypes. Sprogis v. United Air Lines, Inc., *supra* 444 F.2d at 1198. In short, under the Equal Employ-

ment Opportunity Act of 1972, all stereotypic treatment of persons based on race, religion, or sex whether rational or irrational is dead. Because the Department of Water and Power's practice in question here violates these considerations by applying the general actuarial characteristic of female longevity to individual female employees who in reality may or may not outlive individual male employees, the court concludes that plaintiffs have established a case of discrimination under § 703(a)(1) of the Equal Employment Opportunity Act.

Defendants attempt to establish a defense under § 703(h) of the Equal Employment Opportunity Act of 1972. 42 U.S.C.A. § 2000e-2(h) (West 1974). This section states in part that "it shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees . . . if such differentiation is authorized by the provisions of section 206(d) of Title 29." Section 206(d) states in part that "no employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work . . . except where such payment is made . . . (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C.A. § 206(d)(1).

Defendants fail to explain how § 206(d)(1) justifies higher retirement contributions for women. Instead,

they cite § 703(h) and immediately refer to 29 C.F.R. § 800.116(d), a regulation of the Wage-Hour Administrator which implies that segregated actuarial treatment of men and women does not violate the Equal Pay Act. Even if § 206(d)(1) applies to this case, the court believes that differentiation based on sex segregated actuarial tables constitutes a differential based on the "factor" of sex in violation of that section.

The court also concludes that the other elements necessary to support a preliminary injunction are present in this case. Where statutory civil rights of employees are found to have been violated, irreparable injury may be presumed from loss of human dignity which such violations engender. See United States v. Hayes International Corp., 415 F.2d 1038, 1045 (5th Cir. 1969). Moreover, as plaintiffs' affidavits suggest, the potential for irreparable injury is great in that we deal with the present ability of female employees to provide the necessities of life for themselves and their families. Finally, the very subject of this action, sexual discrimination, and the number of persons affected by the Department's practice, supports the conclusion that a preliminary injunction would serve the public interest.[1]

Accordingly, it is ordered that plaintiffs' motion for a preliminary injunction is granted.

It is further ordered that this Memorandum and Order shall constitute the court's findings of fact and

[1]While this opinion was in draft form, the court was notified by defendants in a copy of a letter dated December 26, 1974 that the Department of Water and Power and the Board of Administration of the Department of Water and Power Employees Retirement Plan had adopted a resolution on December 23, 1974, equalizing male and female contributions to the Retirement Plan.

conclusions of law as authorized by Rule 52 of the Federal Rules of Civil Procedure.

It is further ordered that the Clerk of the Court shall serve copies of this Memorandum and Order, by United States mail, upon the attorneys of record for the parties herein.

Findings of Fact.

It is true that:

1. The plaintiffs, Carolyn Mayshack, Margerie Stoop, Alice F. Muller and Ethel L. Lehman, are employees of the defendant, Department of Water and Power of the City of Los Angeles ("Department"). The plaintiff, Marie Manhart, is a former employee of the Department. The plaintiff, Committee to Protect Women's Retirement Benefits, is an association of female, supervisory employees of the Department. The plaintiff, International Brotherhood of Electrical Workers, Local Union No. 18 ("Union"), is an unincorporated labor organization, whose members include certain women who are employed by the Department.

2. The defendant, Department of Water and Power of the City of Los Angeles, employs approximately 2,000 females. The defendant, Board of Commissioners of the Department of Water and Power, directs the affairs of the Departm[illegible]. The defendant, Board of Administration of the Department of Water and Power Public Employees' Retirement, Disability, and Death Benefit Insurance Plan, administers the benefit plans maintained for employees of the Department.

3. The Department maintains a Public Employees' Retirement, Disability, and Death Benefit Insurance Plan ("Plan"). The Plan is funded by compulsory

employee contributions which are matched 110% by compulsory employer contributions. The Plan is also funded by earnings on all contributions.

4. Between March 24, 1972 and December 31, 1974, the Plan paid the same monthly benefits to male and female retirants of the same age and length of service. However, higher contributions were required of female employees than males because acturarial tables used in the administration of the Plan indicate that women in general live longer than men and that women would therefore tend to collect monthly payments for a longer period of time.

5. On or about June 5, 1973, the Union filed with the Equal Employment Opportunity Commission ("EEOC") a charge alleging that the Plan discriminated against females because it required them to contribute more than their male counterparts. The United States Department of Justice issued a notice of right to sue letter on or about September 17, 1973. The plaintiffs filed a complaint in this court on September 26, 1973.

6. The plaintiffs employed legal counsel, who rendered valuable services to the classes in the litigation of the issues presented in this case.

7. On April 5, 1972, the EEOC amended its regulations to state: "It shall not be a defense under Title [VII] to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." 29 C.F.R. 1604.9(e).

The following Conclusions of Law, insofar as they may be considered Findings of Fact, are so found by this court to be true in all respects.

Conclusions of Law.

1. The court has jurisdiction of the plaintiffs' action which was brought pursuant to Section 706(f) of Title VII of the Equal Employment Opportunity Act of 1972 ("Act") (42 U.S.C. § 2000e-5(f)).

2. The plaintiff Union filed a timely charge with the EEOC. After receiving a notice of right to sue letter from the United States Department of Justice, the plaintiffs filed a timely complaint in this court. The plaintiffs have satisfied the jurisdictional prerequisites of the Act for bringing suit in this court.

3. The Department is an employer within the meaning of Section 701(b) of the Act (42 U.S.C. §2000e (b)).

4. With respect to the cause of action brought under Title VII of the Act, on January 25, 1974, the court certified classes which included (a) all female employees presently working for the Department who are members of the Plan, (b) all female members of the Plan who retired from the active service with the Department on or after March 24, 1972, (c) all female employees who resigned from active service with the Department on or after March 24, 1972 and who left their compulsory employee contributions on deposit with the Plan, and (d) all women hired by the Department who became members of the Plan prior to the resolution of this action.

5. The Department's practice of requiring females to make larger monthly contributions to the Plan than their male counterparts is an unlawful employment practice within the meaning of Section 701(a)(1) of the Act (42 U.S.C. § 2000e-2(a)) and no defenses

under Section 703(e) and (h) of the Act have been stated (42 U.S.C. § 2000e-2(e), (h)).

6. The Eleventh Amendment to the United States Constitution does not bar a money recovery against the defendants in this action.

7. The defendants should have been placed on notice that their practice of differential contributions constituted an unlawful employment practice under Section 701(a)(1) of the Act when the EEOC amended its regulations on April 5, 1972 to include what is now 29 C.F.R. 1604.9(e).

8. Under Section 706(g) of the Act, each member of the classes defined in Paragraph 4 of these Conclusions of Law is entitled to a refund measured by the difference between the contributions she was required to make on and after April 5, 1972 and the contributions required of a male who entered the service of the Department at the same age, and on the same date, and earned the same rate of pay throughout his service as the female member of the class. In addition, each member of the class is entitled to interest at seven percent (7%) on her overpayments running from the date of contribution.

9. Counsel for the plaintiffs are entitled by Section 706(k) of the Act (42 U.S.C. § 2000e-5(k)) to reasonable attorneys' fees payable by the defendants.

Dated: June 20, 1975.

HARRY PREGERSON
Harry Pregerson
United States District Judge

APPENDIX C.

Opinion of the Court of Appeals for the Ninth Circuit.
(Amended: December 23, 1976)

United States Court of Appeals, for the Ninth Circuit.

Marie Manhart, et al., *Plaintiffs-Appellees,* vs. City of Los Angeles, Department of Water and Power, a body corporate and politic, et al., *Defendants-Appellants*. No. 75-2729, No. 75-2807, No. 75-2905.

[November 23, 1976]

Appeal from the United States District Court for the Central District of California

Before: CHAMBERS, DUNIWAY and KILKENNY, Circuit Judges

DUNIWAY, Circuit Judge:

The question presented in this case is whether a retirement plan which requires women employees to contribute from their wages 15% more than similarly situated male employees because of the longer average life expectancy of women violates the Civil Rights Act of 1964, Title VII, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2. The district court held that the plan violated Title VII,[1] enjoined the employer from charging the

[1]The relevant provision of Title VII reads:
§ 2000e-2
(a) It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

higher contribution rate against women, and awarded a refund of all excess contributions made on or after April 5, 1972. *Manhart v. City of Los Angeles, Department of Water and Power,* C.D. Cal., 1975, 387 F.Supp. 980.

This is a class action brought by women employees and retirees of the City of Los Angeles, Department of Water and Power [hereinafter "Department"]. The defendants are the Department, the members of the Board of Commissioners of the Department, the members of the Board of Administration of the Department's Employees' Retirement, Disability, and Death Benefit Insurance Plan, the Department's chief accounting officer, and the Department's general manager.

All employees of the Department are required to participate in the established retirement plan which is funded and managed solely within the Department. Each employee must make a monthly contribution to the retirement plan, and the Department matches that contribution 110%. These funds are deposited with the city treasurer but are kept separate and apart from all other monies of the city. The chief accounting employee of the Department is the only person authorized to withdraw money from the retirement account.

The aspect of this program which gives rise to this case is that women employees are required to contribute approximately 15% more than men employees who are identically situated. The Department's justification is that because women get the same monthly benefits upon retiring and because, on the average, they live approximately five years longer, they must, as a group, contribute more.

In June of 1973, the International Brotherhood of Electrical Workers, Local #18, representing the named plaintiffs, filed a charge with the Equal Employment Opportunity Commission [EEOC] alleging that the higher contribution requirement for women was sex discrimination in violation of the Civil Rights Acts of 1871 and 1964. The United States Department of Justice issued a Notice of Right to Sue letter in September of 1973, and this action was filed during that same month.

In their second amended complaint, filed on July 18, 1974, the plaintiffs stated four separate claims for relief, each of which, however, was based upon the same set of facts. The first claim was based upon Title VII, the second upon the Civil Rights Act of 1871, 42 U.S.C. § 1983, the third upon the Fourteenth Amendment to the Constitution, and the fourth, a pendent claim, upon Article 1, §§ 1 and 21, of the Constitution of California.

The plaintiffs' first amended complaint had also asserted claims resting on the same four theories, but had not set them up as separate claims. On March 26, 1974, the court granted in part and denied in part the defendants' motion to dismiss. It granted the motion of the Department, the two boards, and their members in their capacities as members, to dismiss the claim that was based upon 42 U.S.C. § 1983, on the ground that the Department and the Board are not "persons" within the meaning of that section. It denied the motion of the Board members in their individual capacities to dismiss the § 1983 claim, holding that they are "persons," and that they are not immune from suit under § 1983. It granted the motion

of all defendants to dismiss the § 1983 claim insofar as any of it accrued more than three years before the action was filed on September 26, 1973. It denied the motion to dismiss the Title VII claim, except that it granted the motion as to any claim arising before March 24, 1972. It dismissed the claim under the California Constitution. It did not rule on the claim under the Fourteenth Amendment. And it allowed 20 days for the filing of a second amended complaint. After the second amended complaint was filed, no motion was made by any of the defendants to strike or otherwise dispose of those of the allegations that were inconsistent with the court's order of March 26, 1974.

On June 20, 1975, the court granted the plaintiffs' motion for summary judgment, holding that the plan violated Title VII. On the same day it entered a judgment, declaring that the plan, insofar as it requires larger contributions from female employees than from their male counterparts, violates Title VII, and specifically § 701(a)(1) (42 U.S.C. § 2000e-2(a)). The judgment also enjoins requiring larger contributions from females and orders that the Department refund the excess contributions collected on and after April 5, 1972, plus interest at 7%, and that defendants pay counsel for plaintiffs' reasonable attorneys' fees. The judgment says nothing about the claims based on § 1983, the Fourteenth Amendment, or the California Constitution.

On July 7, 1975, the defendants appealed from the judgment. This appeal is our No. 75-2729. On July 11, 1975, the plaintiffs appealed from "that portion of the judgment . . . which denies relief to the plaintiffs

based on the causes of action and defendants dismissed by the Court in its Order Granting and Denying in Part Defendants Motion to Dismiss, entered on or about March 26, 1974." This appeal is our No. 75-2807. On July 17, the district judge denied a motion by the defendants for a stay of the judgment. They appealed on July 30, 1975. This is our No. 75-2905. We later entered an order staying the judgment pending appeal, insofar as it requires the refund of contributions.

After oral argument before us, and in response to an inquiry from the bench, counsel for plaintiffs stipulated, and we ordered, that the plaintiffs "have heretofore abandoned all claims under 42 U.S.C. § 1983 against individual officials in their individual capacities."

I. *Our Jurisdiction.*

A. *No. 75-2729.*

The judgment of June 20, 1975, embodies an injunction against requiring larger contributions from women than from men, and requiring restitution of excess contributions previously paid. As an injunction, it is appealable under 28 U.S.C. § 1292(a)(1). It is not appealable as a final judgment under 28 U.S.C. § 1291. It does not dispose of any claim except the claim under Title VII. It runs only against the defendants, the Department, the two Boards, and their members as such, but not the defendant members individually. It says nothing about the claims or defendants dismissed in the district court's order of March 26, 1974. There is no "express determination that there is no just reason for delay" nor "express direction for the entry of judgment." (F. R. Civ. P. 54(b)).

B. *No. 75-2807.*

We have no jurisdiction of this appeal. The judgment does not do what the notice of appeal says that it does. The order of March 26, 1974, was interlocutory. It did not purport to determine any issue finally. It permitted amendment of the complaint, and the amendment restated, separately, all of the claims asserted but commingled in the original complaint. The plaintiffs were entitled to amend as they did, and the defendants, to protect their record, should have called to the attention of the court the fact that the amended complaint did not fully comply with the court's order of March 26, 1974. The court was not required to reconsider that order but the defendants should have at least suggested that it embody in its subsequent judgment the decision that it made in its March 26, 1974, order, thus disposing of the plaintiffs' claims. The claims remain pending because the judgment does not dispose of them. We have no jurisdiction in No. 75-2807.

It is no answer to say that the plaintiffs have voluntarily abandoned their claims under 42 U.S.C. § 1983 against the individual defendants. That abandonment binds the plaintiffs, but it does not affect their claims against the Department and its Boards and their members and employees in their official capacities under § 1983. Those claims are still pending in the district court and are not properly before us.

C. *No. 75-2905.*

Because we have granted a stay, and because we are now affirming the judgment in No. 75-2729, this appeal is moot.

II. *The Merits of the Judgment.*

The basis of the defendants' appeal is that, while requiring women to make larger contributions discriminates against women, there is a sound basis for the requirement, making it a discrimination based on longevity, not sex, and therefore not the kind of invidious discrimination that Title VII was intended to abolish. We disagree.

It is undisputed that the overriding purpose of Title VII is to require employers to treat each employee (or prospective employee) as an individual, and to make job related decisions about each employee on the basis of relevant individual characteristics, so that the employee's membership in a racial, ethnic, religious, or sexual group is irrelevant to the decisions. *See Griggs v. Duke Power Co.*, 1971, 401 U.S. 424, 436. To require every individual woman to contribute 15% more into the retirement fund than her male counterpart must contribute because women "on the average" live longer than men is just the kind of abstract generalization, applied to individual women because of their being women, which Title VII was designed to abolish. Not all women live longer than all men, yet each individual woman is required to contribute more, not because she as an individual will live longer, but because the members of her sexual group, on the average, live longer.

The Department argues, however, that Congress did not intend Title VII to prohibit drawing sexual distinctions when there is a statistically valid basis for doing so and when it is impossible to determine ahead of time when the individual employee is going to die. Thus it is argued that, because it is undisputed that

women on the average do live longer, and because it is not possible to predict which women will actually live longer, Title VII ought to permit a higher contribution requirement for all women.

The problem raised by this case is unique. There have been two basic policies which have guided the courts in prior Title VII litigation: (1) the policy against attributing general group characteristics to each individual member of the group, the major thrust of the statute, and (2) the policy allowing relevant employment factors to be considered in differentiating among individuals. *See* Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs,* 74 *Col. L. Rev.* 1203, 1219 (1974). Heretofore, these two policies have not conflicted because in cases where general group characteristics were attributed to the individual employee, the relevant employment characteristics were capable of being individually measured. *Id.* at 1220. For example, in *Rosenfeld v. So. Pacific Co.,* 9 Cir., 1971, 444 F.2d 1219, we held that refusing to hire women for positions which entailed long hours and heavy physical effort violated Title VII because it entailed attributing the generally weaker physique of women to all women. An important basis of our decision was the fact that each individual woman applicant could actually be tested to see whether the relevant characteristic of strength was or was not in fact lacking.

This same consideration has been present in cases finding illegal: (1) the refusal to allow women to work overtime because of a belief that women as a group cannot work the long hours that men can, *Schaeffer v. San Diego Yellow Cabs, Inc.,* 9 Cir.,

1972, 462 F.2d 1002; (2) the forced retirement of all women at an earlier age than men because of a belief that; on the average, men were capable of adequate performance longer than women, *Rosen v. Public Service Electric and Gas Co.,* 3 Cir., 1973, 477 F.2d 90, *Bartmess v. Drewrys U.S.A., Inc.,* 7 Cir., 1971, 444 F.2d 1186; (3) the termination of women employees who married because of a belief that, on the average, women could not work effectively and keep an adequate home life, *Sprogis v. United Air Lines, Inc.,* 7 Cir., 1971, 444 F.2d 1194; (4) the refusal to hire men as flight attendants because men, on the average, are said to be emotionally unsuited for that type of work, *Diaz v. Pan Am. World Airways, Inc.,* 5 Cir., 1971, 442 F.2d 385; (5) the refusal to hire women as telephone switchmen because of a belief that, on the average, women are incapable of working the long hours and doing the leavy lifting involved, *Weeks v. Southern Bell Telephone & Telegraph Co.,* 5 Cir., 1969, 408 F.2d 228; (6) requiring pregnant women to take mandatory leave after six months of pregnancy because, on the average, pregnant women are supposed to be incapable of working adequately after that point, *Berg v. Richmond Unified School Dist.,* 9 Cir., 1975, 528 F.2d 1208; (7) the refusal to hire women with preschool children because of a belief that family responsibilities would interfere with their job performance, *Phillips v. Martin Marietta Corp.,* 1971, 400 U.S. 542.

In the present case a relevant characteristic in determining how large an individual's retirement contribution should be is an informed prediction as to how long the person will live. But this characteristic, unlike those

in the prior cases, is impossible to determine on an individual basis at the time when the contribution must be made. Thus, the policy of allowing relevant factors to be considered can be met only by allowing the group longevity statistics to be attributed to the individual members of the group. Yet this is exactly what the thrust of Title VII prohibits. We are therefore faced with the unique case in which the policy against per se discrimination directly conflicts with the policy of allowing relevant factors to be considered.

To support its argument that the actuarial distinctions are permitted under Title VII, the Department points to both the "bona fide occupational qualification exception" in 42 U.S.C. § 2000e-2(e) and the Bennett Amendment to Title VII, 42 U.S.C. § 2000e-2(h). Reconciliation of the conflicting policies noted above would be easy if Congress had specifically covered the kind of actuarial distinction that is before us in one of the exceptions which the Department cites. Both, however, are very general and have no language relating to actuarially determined discrimination, much less to pension plans.

A. *The Bona Fide Occupational Qualification [BFOQ] Exception.*

Title 42 U.S.C. § 2000e-2(e) states that an employer may discriminate on the basis of religion, sex, or national origin "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." EEOC, which is charged with administering and enforcing Title VII and whose interpretations of that statute are entitled to great deference,

Griggs v. Duke Power Co., supra, 401 U.S. at 433-34; *Hutchinson v. Lake Oswego School Dist. #7,* 9 Cir., 1975, 519 F.2d 961, 965, has issued guidelines directing that the BFOQ exception "be interpreted narrowly." 29 C.F.R. § 1604.2(a). In one of the few cases ruling on this exception, the Fifth Circuit has said:

> the use of the word "necessary" in [§ 2000e-2(e)] requires that we apply a business *necessity* test, not a business *convenience* test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined. . . .
>
> *Diaz v. Pan Am. World Airways, Inc., supra,* 442 F.2d at 388 [italics in original].

See also Weeks v. Southern Bell Telephone & Telegraph Co., supra, 408 F.2d at 232.

Discriminating against women in setting the amount of retirement contributions in no way affects the ability of the Department to provide water and power to the citizens of Los Angeles. Even if it could be said that the relevant business function here involved is that of providing employees with a stable and secure pension program there is no showing that sexual discrimination is necessary to protect the essence of that function. Actuarial distinctions arguably enhance the ability of the employer and the pension administrators to predict costs and benefits more accurately, but it cannot be said that providing a financially sound pension plan requires an actuarial classification based wholly on sex. This is especially true when distinctions based on many other longevity factors (*e.g.*, smoking and drinking habits, normality of weight, prior medical

history, family longevity history) are not used in determining contribution levels. Thus, we find that the BFOQ exception does not permit the sexual classification challenged in this case.

B. *The Bennett Amendment.*

In its original proposed form, 42 U.S.C. § 2000e-2(h) stated that discrimination among employees was permitted if based on a bona fide seniority or merit system, a system rewarding quantity or quality of production, different work locations, or professionally developed ability tests. Because the inclusion of "sex" as one of the categories of discrimination made illegal by Title VII was done by last minute amendment, received almost no attention, and produced no legislative history, *see* 110 Cong. Rec. 2720 (Rep. Green's remarks, Feb. 10, 1964); Berstein & Williams, *supra,* 74 *Col. L. Rev.* at 1216-17, Senator Bennett became concerned that the Act might inadvertently conflict with the Equal Pay Act of 1963, which had received careful attention the year before. Therefore, he proposed, and Congress approved, an amendment to § 2000e-2(h), which reads:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [the Equal Pay Act].

Title 29 U.S.C. § 206(d)(1), which was thus incorporated into the Civil Rights Act of 1964 by the Bennett Amendment, says that it shall be unlawful to discriminate on the basis of sex in paying wages:

> except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

It is exception iv which the Department says permits the kind of actuarially based discrimination that is in question here. However, it does not seem reasonable to us to say that an actuarial distinction based entirely on sex is "based on any other factor other than sex." Sex is exactly what it is based on.

Additionally, the legislative history of the Equal Pay Act indicates that the general language of § 206(d)(1) was not intended to exempt pension plans, or any actuarially based employee program, from its coverage. The House Committee on Education and Labor, which reported out the Equal Pay Act, commented on the exceptions as follows:

> Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board parlance and describes certain unusual, higher than

normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs. House Report #309 to accompany H.R. 6060, May 20, 1963, Committee on Labor and Education, reprinted in 1963 *U.S. Code Cong. & Admin. News* 687, 689 (88th Cong., 1st sess.).

This is the only legislative history coming from the House concerning the exceptions upon which the Department relies. It seems clear that, at least in the House, exception iv was seen only as a catch-all category which would permit distinctions similar to those based on seniority, merit, or production but which do not literally fall into any of those categories, and not a disguised grant of legitimacy for pension plan discrimination based on sex.[2]

The report of the Senate Committee on Labor and Public Welfare indicates that, unlike the House committee, the Senate committee did specifically consider how pension and insurance plans would fit into the scheme of the Equal Pay Act. It commented:

> Furthermore, questions can legitimately be raised as to the accuracy of defining such costs as pension and welfare payments as related to sex. It has

[2]It is especially significant that the Committee made no mention of pension plans, because the problem was specifically brought to its attention during the hearings conducted on the Equal Pay Act. Hearings before the House Special Subcommittee on Education & Labor, 88th Cong., 1st sess., 1963 (Equal Pay Act, H.R. 3861) at p. 103.

> been pointed out that the higher susceptibility of men to disabling injury can result in a greater cost to the employer, and that these figures as to health and welfare costs can only be applied plant-wide. It may be that it is more expensive to hire women in one department but it is more expensive to hire men in another, and overall cost figures may demonstrate conclusively that the employer has made a sound decision to hire women and pay them on an equal basis.
>
> It is the intention of the committee that where it can be shown that, on the basis of all of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential, the Secretary can permit an exception similar to those he can permit for a bona fide seniority system or other exception mentioned above.
>
> Senate Report #176 to accompany S. 1409, May 13, 1963, Committee on Labor and Public Welfare, at p. 4 (88th Cong., 1st sess.).

This seems to indicate that the Senate had a broader view of exception iv than did the House in that, when an employer can demonstrate that he incurs significant costs because of employing a particular sex, exception iv would allow the Secretary of Labor, through the Wage-Hour Administrator, to grant an exception from the provisions of the Act.

However, in this case there is nothing in the record to show, and the Department does not claim, that it requires higher contributions from women because it would be economically penalized if it did not; it

requires the higher contributions only because it believes that the pension fund itself will thereby be better funded and easier to administer. Thus, whatever the Senate committee had in mind about the Equal Pay Act, it would not, when grafted onto the provisions of Title VII, be the kind of broad exception to the rule against per se discrimination which the Department needs to justify the contribution rate differential here involved. Neither the clear language of the statute, § 206(d)(1), nor the legislaive history supports the Department's position.

Nonetheless, the Department points to a dialogue between Senator Humphrey, the floor manager of the 1964 Civil Rights Act, and Senator Randolph, which occurred during the floor debate on the 1964 Act (not the Equal Pay Act) and Title VII.

> SEN. RANDOLPH: Mr. President, I wish to ask of the Senator from Minnesota [Mr. Humphrey], who is the effective manager of the pending bill, a clarifying question on the provisions of title VII.
>
> I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing. Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options

> for women, may continue in operation under this bill, if it becomes law?
>
> SEN. HUMPHREY: Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it.
>
> 110 Cong. Rec. 13663-64, June 12, 1964.

Although this does seem to give support to the Department's position, we do not find it to be persuasive legislative history. The discussion occurred hours after passage of the Bennett Amendment and cannot be said to be part of the legislative history of that amendment. The Department claims that although the statement was made after the Bennett Amendment was adopted, it was still made before the Senate voted on the entire Civil Rights Act. Thus, it claims that Senator Randolph and others who may have wanted to preserve such distinctions were misled into not offering a further amendment for that purpose. This argument might have some merit were it not for the fact that the same Congress (the 88th) passed both the Civil Rights Act and the Equal Pay Act, and it seems unlikely that Senator Humphrey's erroneous interpretation of the latter misled many, if any, senators. It certainly misled no members of the House. So far as appears, members of the House never heard of it.

We note, too, that every case that has considered whether sex-based early retirement options violate Title VII has held that they do, although it does not appear that the colloquy between Senators Randolph and Humphrey was called to the attention of the courts. ***See Chastang v. Flynn and Emrich Co.***, 4 Cir., 1976, ... F.2d .... (slip op. June 10, 1976); ***Rosen v. Public***

Service Electric & Gas Co., supra; Bartmess v. Drewrys U.S.A., Inc., supra; Fitzpatrick v. Bitzer, D. Conn., 1974, 390 F. Supp. 278, 287-88, *aff'd,* 2 Cir., 1975, 519 F.2d 559, *rev'd on other grounds,* 1976, ... U.S. ..... *See also Peters v. Missouri Pacific R. Co.,* 5 Cir., 1973, 483 F.2d 490, 492, n.3.

As we have noted, Senator Humphrey's remark reflects an erroneous interpretation of the Equal Pay Act. Because all that the Bennett Amendment did was to incorporate the exemptions of the Equal Pay Act into Title VII, it is questionable whether the Senator's statement, made during the debates on the incorporating statute, would be significant when it erroneously interprets the incorporated statute.

The Department cites as additional authority interpretations of the Equal Pay Act by the Administrator of the Wage and Hour Division of the Department of Labor. As the official charged with enforcing and interpreting the Equal Pay Act, his interpretations of that Act are entitled to great deference. *Udall v. Talman,* 1965, 380 U.S. 1. However, the interpretation relied on by the Department, appearing at 29 C.F.R. § 800.116(d), merely states that in providing benefit plans for employees through outside insurers an employer does not violate the Equal Pay Act if either the amount contributed by the employer for each employee is the same and resulting benefits are different or if the amount of the benefit is the same while the employer contributions differ. While this reflects the Wage-Hour Administrator's general thinking, it does not deal directly with our case of an employer requiring greater pension plan contributions from women employees when the plan is funded and administered by the employer and its employees.

We note, too, that to the extent that the Wage-Hour Administrator's interpretation does deal with the present case, his interpretation conflicts with that of EEOC, which administers Title VII and whose interpretations of Title VII must be given great deference. Therefore, the EEOC interpretations of the Bennett Amendment are worthy of more deference than are those of the Wage-Hour Administrator relating to the Equal Pay Act. The EEOC regulation, 29 C.F.R. § 1604.9(e & f), makes it a violation of Title VII where a benefit plan provides unequal benefits to employees even if employer contributions are equal. However, like the Wage-Hour Administrator's, these regulations do not squarely cover the present case. Thus, the Department's reliance on administrative interpretation is misplaced.

Our opinion of the effect of Title VII in this case is reinforced by the fact that following the passage of Title VII Congress did expressly exempt actuarially based pension and retirement funds from the provisions of the Age Discrimination Act of 1967, 29 U.S.C. § 623(f)(2). In fact, during deliberations on the 1964 Civil Rights Act, Senator Smathers moved to add "age" as one of the types of discrimination made illegal by Title VII, but the amendment was defeated in part because of a concern that inclusion of "age" as a Title VII protected category might have "tremendous implications" on industrial group insurance and pensions. *Equal Employment Opportunity Commission, Legislative History of Titles VII and IX of Civil Rights Act of 1964,* at 3174 (1968). This tends to indicate that Congress did foresee that actuarially based plans would fall under the provisions of Title VII, and that it felt that age discrimination, but not

sex discrimination, on such a basis was proper. Thus, by not adding "age" to Title VII in 1964 and not making a pension plan exception to its terms for "sex," and by later prohibiting age discrimination in a separate bill which does make a pension plan exception to its terms for age, Congress gave a strong indication that it did intend to place sex discrimination in pension and retirement plans, even when based on actuarially sound tables, within the type of discrimination forbidden by Title VII.

We emphasize that our holding rests on the clear policy behind Title VII of requiring that each employee be treated as an individual. Setting retirement contribution rates solely on the basis of sex is a failure to treat each employee as an individual; it treats each employee only as a member of one sex. We do not pass judgment on the legality of a plan which determines contribution rates based on a significant number of actuarially determined characteristics, one of which is sex. Our holding is limited to the proposition that when sex is singled out as the only, or as a predominant, factor, the employee is being treated in the manner which Title VII forbids.

One district court case has dealt with a situation very similar to ours. In *Henderson v. Oregon,* D. Ore., 1975, 405 F. Supp. 1271, the court relied heavily on the lower court decision in the present case in holding a scheme similar to that involved here illegal under Title VII.

Our holding agrees with the only administrative ruling dealing with the exact question before us, one made by the EEOC, EEOC Dec. #75-146, Jan. 13, 1975, 2 *CCH Employment Practices* 4190, ¶ 6447.

Relying in part on its earlier interpretation, noted *supra,* the Commission held:

> An inescapable corollary to this principle is that an employer may not require a higher contribution from members of one sex where benefits to members of both sexes are the same.
>
> [This] is based upon the fundamental Title VII precept that generalizations relating to sex, race, religion, and national origin cannot be permitted to influence the terms and conditions of an *individual's* employment, even where the generalizations are statistically valid.

III. *The Reimbursement Issue.*

The Department finally argues that even if the higher contribution required of women violates Title VII, it would be unfair to refund to the plaintiffs the amounts that they contributed in excess of the amounts that similarly situated male employees contributed. The Department says that it was acting in good faith in that it believed that state law requiring that retirement plans be run on a "sound actuarial basis" (Cal. Gov't Code § 45342) mandated the use of sex-based actuarial tables, and that paying these contributions back to the women employees would leave the retirement plan underfunded.

The rule that we have adopted relating to monetary awards for past violations of Title VII is stated in *Schaeffer v. San Diego Yellow Cabs, Inc.,* 9 Cir., 1972, 462 F.2d 1002.

> In the case of damages of this nature, a court must balance the various equities between the parties and decide upon a result which is consistent

> with the purposes of the Equal Employment Opportunities Act, and the fundamental concepts of fairness. *Id.* at 1006.

The defendant in *Schaeffer* argued that in denying women overtime work it has relied in good faith on a state statute requiring that women not work more than eight hours a day, and that therefore it was unfair to make it pay damages for an unwitting violation. We rejected that defense with the following comment:

> Rather than drawing any hard and fast rule concerning the defense of good faith reliance on a state statute, we believe that in each case the merits of the plaintiff's claim and the public policy behind it must be balanced against the hardship on a good faith employer. *Id.* at 1007.

Applying this test to the case at bar, we find that the district court did not abuse its discretion in awarding plaintiffs a refund of their excess contributions.

In the first place, the state statute requiring that such plans be administered on a sound actuarial basis by no means requires that the Department use sex-based, and only sex-based, distinctions. In *Schaeffer*, where we found a back pay award proper, the statute prohibiting women from working more than eight hours a day placed a much greater compulsion on the employer to refuse women overtime work than the statute in the present case placed on the Department to require higher retirement contributions.

Second, *Schaeffer* was a case where back pay was awarded to women for work that they did not perform but which they had sought. The plaintiffs did not

earn the award; they were merely denied the opportunity to earn it. This case involves *restitution*, a situation where the plaintiffs actually earned the amount in question, but then had it taken from them in violation of Title VII. It is one of the primary purposes of Title VII, to "make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 1975, 422 U.S. 405, 418. In light of this purpose we find plaintiffs' claim to recover money rightfully theirs to be very compelling.

In contrast to the plaintiffs' compelling claim, we find the Department's "good faith" defense to be less than compelling. The Supreme Court has recently commented on this "good faith" defense as follows:

> But, under Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor. If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the "make whole" purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in "bad faith." *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 422.

The impact of returning the excess contributions to the plaintiffs in this case is far from oppressive. The amount involved is only 15% of the contributions made by a minority of the Department's employees for the 33-month period from April 5, 1972, to December 31, 1974. This might leave the plan somewhat underfunded, but a number of solutions to that problem

are readily available. Benefits could be lowered. Current contributions from all employees could be increased. The Department could raise its matching percentage on current contributions, or it could make a lump sum payment into the fund to offset the reimbursements. However, whatever the adjustments that would have to be made, we do not find that the burden on the pension plan or the Department is sufficient to offset the compelling claim of the plaintiffs to recover the money which they were wrongfully required to contribute. *See also Rosen v. Public Service Electric and Gas Co., supra,* 477 F.2d at 95-96.

In No. 75-2729, the judgment is affirmed.

In No. 75-2807, the appeal is dismissed.

In No. 75-2905, the appeal is dismissed as moot. The stay heretofore granted by this court will expire when the mandate issues.

APPENDIX D.

Marie MANHART et al., Plaintiffs-Appellees,

v.

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic, et al., Defendants-Appellants.

Nos. 75-2729, 75-2807 and 75-2905.

United States Court of Appeals, Ninth Circuit.

April 18, 1977.

Suit was brought challenging retirement plan which required women employees to contribute from their wages 15% more than similarly situated male employees because of the longer average life expectancy of women. On motion for summary judgment, the United States District Court for the Central District of California, Harry Pregerson, J., held that the plan violated Title VII of the Civil Rights Act of 1964, enjoined the municipal employer from charging the higher contribution rate against women, awarded a refund of all excess contributions made on or after April 5, 1972, and the defendants appealed. The Court of Appeals, Duniway, Circuit Judge, held, inter alia, that the retirement plan was violative of Title VII, notwithstanding defendants' claim that the discrimination was based on longevity, not sex, and was not the kind of invidious discrimination that Title VII intended to abolish. On petition for rehearing, the Court of Appeals, Duniway, Circuit Judge, held that the Supreme Court's recent "General Electric" decision, which held that the exclusion of pregnancy from a program of disability insurance is not discrimination based on sex as such, did not require a change in the judgment entered.

Petition for rehearing denied.

Kilkenny, Circuit Judge, filed a dissenting opinion.

Federal Courts ⇐925

Court of Appeals' prior determination that retirement plan, which required women employees to contribute from their wages 15% more than similarly situated male employees, violated Title VII of the Civil Rights Act of 1964 was not affected by Supreme Court's recent "General Electric" decision, which held that the exclusion of pregnancy from a program of disability insurance is not discrimination based on sex as such, since the pension plan in question was clearly discriminatory on the basis of sex, since, unlike the situation in "General Electric," the plan was facially discriminatory, and since, again unlike the "General Electric" situation, there were no inconsistent administrative rulings.

On Petition for Rehearing.

Before CHAMBERS, DUNIWAY and KILKENNY, Circuit Judges.

DUNIWAY, Circuit Judge:

Appellants petition for a rehearing and suggest a rehearing *in banc*. Their principal reliance is upon the decision of the Supreme Court in *General Electric Co. v. Gilbert*, 1976, — U.S. ——, 97 S.Ct. 401, 50 L.Ed.2d 343, which was decided on December 7, 1976, just two weeks after our decision was filed on November 23, 1976. We conclude that the *General Electric* case does not require a change in our judgment, for several reasons.

Synopses, Syllabi and Key Number Classification COPYRIGHT © 1977, by WEST PUBLISHING CO.

The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

First, in that case, as in *Geduldig v. Aiello*, 1974, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256, upon which the Court primarily relied, the facts were different from the facts in the case at bar. In each of those cases, a program of disability insurance was involved, and in each pregnancy was excluded as a disability. The Court held that the exclusion was not a discrimination based upon gender as such. It pointed out that the exclusion of pregnancy as a disability "divides potential recipients [of benefits] into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." *General Electric, supra*, — U.S. at ——, 97 S.Ct. at 407, quoting from *Geduldig, supra*, 417 U.S. at 496–97, n. 20, 94 S.Ct. 2485. Thus, said the Court, the exclusion of pregnancy "was not in itself discrimination based on sex," — U.S. ——, at ——, 97 S.Ct. 401, at 407.

The same cannot be said of the pension plan of the Department in the case at bar. A greater amount is deducted from the wages of every woman employee than from the wages of every man employee whose rate of pay is the same. How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a whole, longevity, and it disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that the difference is not based on sex is to play with words.

In addition, as the Court pointed out in *General Electric*, under the disability programs in that case and in *Geduldig*, "The 'package' going to relevant identifiable groups . . .—male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.' *Geduldig*, 417 U.S. at 496–97, 94 S.Ct. at 2492" *General Electric*, — U.S. ——, p. ——, 97 S.Ct. 401, p. 409. "[G]ender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive." *Id.* at ——, 97 S.Ct. at 409 (footnote omitted).

The pension plan in the case at bar is different. The monthly benefit is the same for men and for women, but the cost to women is higher than the cost to men, and this is solely because they are women. Thus the plan is facially discriminatory because, while the plan is all inclusive as to retirement benefits, it is discriminatory, on the basis of sex alone, as to costs to the employees.

Finally the Court's opinion in *General Electric* requires that we reconsider our analysis of the legislative history of the Bennett Amendment (see part II. B. of our opinion). However, upon that reconsideration, we conclude that a different result is not required in this case. Appellants stress the Court's reliance, in *General Electric*, upon the colloquy between Senators Humphrey and Randolph, discussed in *General Electric* at — U.S. ——, at ——, 97 S.Ct. 401 at 412, and in our opinion at —— – —— (slip op. at 12–13). We did not find it to be persuasive legislative history; the Supreme Court did find it persuasive. We are, of course, bound by that conclusion, but we do not think that it follows that the judgment in this case is erroneous.

In *General Electric*, the Court relied also, and, we think, more heavily, on rulings of the Wage and Hour Administrator construing the Equal Pay Act, and

on the fact that EEOC rulings were inconsistent with each other as well as with the rulings of the Administrator (— U.S. ——, at —— – ——, 97 S.Ct. 401 at 411–412). In our case, there are no such inconsistencies.

In his brief as amicus curiae in this case, the Secretary of Labor points out that he (or the Administrator acting for him) "has never approved a practice of requiring women employees to make contributions to a pension plan which are larger than those required of similarly situated men employees." (Brief at 6) The rulings of the Secretary on which the Department relies do not deal with a requirement that female employees must make greater contributions to the plan than male employees, a requirement which diminishes the current available or "take home" wages of women, as compared to those of men.

In his June 18, 1964 opinion letter (BNA's WHM 95:607), the Administrator disapproved of a wage differential between men and women based upon alleged higher costs of employing women, a part of those costs being for pensions. In an Interpretive Bulletin issued February 11, 1966 (3 F.R. 2657, 29 C.F.R. § 800.151), the Administrator said:

> A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group does not qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purposes of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility.

There are no rulings of the Secretary or Administrator inconsistent with this. The one which the Department cites, issued September 9, 1965, and amended May 6, 1966, 30 F.R. 11504 and 31 F.R. 6770, 29 C.F.R. § 800.116(d) deals with employer contributions, not compulsory employee contributions which are here involved, and which, under 29 C.F.R. § 800.151 cannot be unequal.

No ruling of EEOC conflicts with 29 C.F.R. § 800.151. Nor has EEOC taken inconsistent positions in relation to the problem before us. Its position is stated in 29 C.F.R. § 1604.9, issued April 5, 1972, 37 F.R. 6836, and in EEOC Dec. # 75–146 of Jan. 13, 1975, 2 *CCH Employment Practices* 4190, ¶ 6447, both discussed in our opinion. We know of no prior inconsistent rulings. Thus this case is quite unlike *General Electric*, where there was conflict between EEOC rulings and between rulings of EEOC and those of the Secretary of Labor. Here, the administrative rulings, as they relate to the problem before us, are consistent and support the result that we have reached.

The petition for a rehearing is denied. The suggestion of a rehearing *in banc*

has been transmitted to all judges of the court, and no judge has requested a vote on the suggestion. Rule 35(b) F.R. App.P. The suggestion of a rehearing *in banc* is rejected.

KILKENNY, Circuit Judge, dissenting:

I share the views of the majority on the jurisdictional issues, but have serious reservations with respect to the manner in which the majority disposes of the appellants' claims in No. 75–2729. In my opinion, they should have been allowed to prove their case.

I am convinced that the legal principles enunciated in *General Electric Co. v. Gilbert*, —— U.S. ——, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), are here controlling and that the district court erred in granting a summary judgment against the appellants. At a minimum, the court should have conducted a trial on the issue of whether the appellants' retirement plan was justified on the basis of recognized actuarial tables showing the difference in longevity between males and females. As it now stands, the lower court here made the same mistake as the district court in *General Electric* in its refusal to consider any cost differential defense. As stated by the Supreme Court:

> "The District Court was wrong in assuming, as it did, 375 F.Supp., at 383, that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.'" *General Electric* at ——, 97 S.Ct. at 410, n. 17.[1]

The uncontroverted affidavits in the record before the district court and now before us show clearly that women live substantially longer than men and that the higher female contribution [approximately 15% more than male employees] is fully justified on an actuarial basis. These affidavits further show that this plan, like all annuity plans, is based upon the life expectancy of its beneficiaries, and that mortality tables in use throughout the western commercial world separate male mortality rates from female mortality rates. Moreover, one affiant states that the plan before us was adopted as a result of his 1972 study of the mortality rates of the appellants' employees. The plan follows the "1951 Group Annuity Mortality Table" published in the *Transactions of the Society of Actuaries*.

Consistent with all available studies and plans, this particular plan uses separate mortality tables for men and women and was used to determine the total monies that had to be set aside for the lifetime retirement allowances of employees. Many other relevant facts are set forth in these affidavits, including the undisputed statement that no tables have as yet been developed which measure life expectancy on a *unisex* basis, as required by the majority. Furthermore, these affidavits attest to the fact that unisex mortality tables, if developed, could lead to a result which adversely affects the financial integrity of annuity or pension plans such as here before us.

GENERAL ELECTRIC v. GILBERT

Against this background, the majority purports to distinguish *General Electric*. From the general finding in *General Electric* that the exclusion of pregnancy was not in itself discrimination based upon sex, it is apparent to me that the Supreme Court has rejected the broad doctrines espoused by the majority. Moreover, neither *Craig v. Boren*, —— U.S. ——, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), nor *Califano v. Goldfarb*, —— U.S. ——, 97 S.Ct. 1021, 51 L.Ed.2d —— (1977), detract from what is said in *General Electric*. To summarily conclude, like the majority, that "[t]o say that the difference [here] is not based on sex is to play with words. . . ." is simply an inadequate response to the issues presented. I am of the impression that the majority, rather than the appellants, is playing with words. The appellants' claim deserves more consideration than this conclusory statement.

The majority similarly glosses over the language in *General Electric* regarding the *effect* of the exclusion of pregnancy. The Court recognized that a proper showing of "gender-based effects" may be sufficient to establish a *prima facie* case under Title VII, but it was not there present, and it is not here present.[2] This is made manifest by a comparison of the circumstances here present with those of *General Electric*. As stated in *General Electric:*

> ". . . As in *Geduldig, supra*, [417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974)] *we start from the indisputable baseline that '[t]he fiscal and actuarial benefits of the program . . . accrue to members of both sexes,'* 417 U.S., at 497 n. 20, [94 S.Ct. at 2492]. We need not disturb the findings of the District Court to note that there is neither a finding, nor was there any evidence which would support a finding, that the financial benefits of the Plan '*worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program,' id.*, at 496 [, 94 S.Ct., at 2492]. The Plan, in effect (and for all that appears), is nothing more than an insurance package, which covers some risks, but excludes others, see *id.*, at 494, 496–497, [94 S.Ct. at 2491–2492]. The 'package' going to relevant identifiable groups we are presently concerned with—General Electric's male and female employees—covers exactly

1. The Supreme Court also noted that the district court ". . . declined to find that the *present actuarial value* of the coverage was equal as between men and women, . . ." *General Electric*, at ——, 97 S.Ct. at 406. [Emphasis Added.]

2. The Court recognized that a proper showing of cause and effect may be sufficient:

> "The instant suit was grounded on Title VII rather than the Equal Protection Clause, and our cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another. See *Washington v. Davis*, [426 U.S. 229,] 96 S.Ct. 2040, 2051, [48 L.Ed.2d 597] (1976). For example, in the context of a challenge, under the provisions of § 703(a)(2), to a facially neutral employment test, this Court held that a prima facie case of discrimination would be established if, even absent proof of intent, the consequences of the test were '*invidiously to discriminate on the basis of racial or other impermissible classification,*' *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, [91 S.Ct. 849, 853, 28 L.Ed.2d 158] (1971). Even assuming that it is not necessary in this case to prove intent to establish a prima facie violation of § 703(a)(1), but cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–806 [, 93 S.Ct. 1817, 1824–1826, 36 L.Ed.2d 668] (1973), *the respondents have not made the requisite showing of gender-based effects.*" *General Electric*, —— U.S. at ——–——, 97 S.Ct. at 408–409. [Emphasis Added.] [Footnotes Omitted.]

Footnote 14 on the same page deals with the burden of proof:

> "Respondents, who seek to establish discrimination, *have the traditional civil litigation burden of establishing that the acts they complain of constituted discrimination in violation of Title VII.* . . ." [Emphasis Added.]

the same categories of risk, *and is facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.' Geduldig*, 417 U.S., at 496–497, [94 S.Ct., at 2492]. *As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive.* For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks. To hold otherwise would endanger the common-sense notion that an employer who has no disability benefits program at all does not violate Title VII even though the 'underinclusion' of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other. Just as there is no facial gender-based discrimination in that case, so, too, there is none here." *General Electric* at ——————, 97 S.Ct. at 409–410. [Emphasis Added.] [Footnotes Omitted.]

Similarly, it is obvious here that the fiscal and actuarial benefits of the plan accrue to the members of both sexes. As in *General Electric*, the plan is facially nondiscriminatory to the extent that there is no risk for which one sex is covered and the other is not. Because of the additional contribution made by both the employer and the women employees, the aggregate risk protection for men and women is identical. As a consequence of objectively identifiable characteristics [reflected in actuarial statistics], this plan impacts more heavily upon women than men. [But women live longer than men and ultimately recover as much if not more.] This was also the case in *General Electric* and the Court there refused to find a Title VII violation. Its reasoning is made abundantly clear in Footnote 17, which reads:

> "Absent proof of different values, the cost to 'insure' against the risks is, in essence, nothing more than extra compensation to the employees, in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the 'insurance,' there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the 'extra' disabilities due to pregnancy. While respondents seem to acknowledge that the failure to provide any benefit plan at all would not constitute sex-based discrimination in violation of Title VII, see note 18, *infra*, they illogically also suggest that the present scheme does violate Title VII because
>
> 'A female must spend her own money to buy a personal disability policy covering pregnancy disability if she wants to be fully insured against a period of disability without income, whereas a male without extra expenditure is fully insured by GE against every period of disability.' Supplemental Brief for Martha Gilbert *et al.* on Reargument, at 11. Yet, in both cases—the instant case and the case where there is no disability coverage at all—the ultimate result is that a woman who wished to be fully insured would have to pay an incremental amount over her male counterpart due solely to the possibility of pregnancy-related disabilities. Title VII's proscription on discrimination does not require, in either case, the employer to pay that incremental amount. . . . " *General Electric* at ——, 97 S.Ct. at 409–410.

In one respect, at least, the present facts are more compelling than those of *General Electric* because the employer here was actually paying more for each female employee than for each male employee. The just quoted language would have allowed the employer/appellants to pay the same amount for each, in which case each female employee would have received less insurance protection than each male employee. If no insurance at all was provided under the plan, each female employee, if she purchased outside insurance, would have to pay more than her male counterpart for the same amount of insurance. In either case, after *General Electric* it is illogical to argue that a Title VII violation would result.

Throughout its opinion, the majority substantially exaggerates the strength of its position. It suggests that the Supreme Court was more concerned with inconsistent administrative interpretations than it was with our original and erroneous view of the legislative history. To support its position, the majority finds that there are no such inconsistencies in the case before us. I disagree.

The Wage and Hour Administrator of the Department of Labor has promulgated a number of regulations. After *General Electric*, I question the vitality of the one quoted by the majority; one [29 CFR § 800.116(d)] noted by the Supreme Court in *General Electric* is more in point. This regulation states

> "*If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than the other.* The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees." [Emphasis Added.]

The majority's tortured views on the obvious breadth of *General Electric* become apparent in its writing around and failure to accept the Supreme Court's application of this regulation. This regulation, as I read it, contemplates the actuarial equivalent of the scheme before us. If employer contributions are equal for men and women, there is no statutory violation even though the resulting benefits are not equal as between men and women. The majority fails to appreciate the significance of this. In the context of pension plans, this rule makes sense only if it is read to impliedly authorize the funding of employee pension plans upon the basis of separate mortality tables. This regulatory justification for a plan with equal contributions and unequal benefits cannot be ignored in the variation before us.

In 1965, the EEOC promulgated regulations under which it agreed to follow

the relevant interpretations of the Wage and Hour Division. 29 CFR § 1604.7(b) provided:

> "*Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor.* These interpretations are found in 29 Code of Federal Regulations, Part 800.119–800.163. *Relevant opinions of the Administrator interpreting 'the equal pay for the equal work standard' will also be adopted by the Commission.*" 30 F.R. 14928. [Emphasis Added.]

This regulation was maintained until the EEOC repealed it in 1972, 37 F.R. 6836. Now 29 CFR § 1604.8 discusses the applicability of defenses raised under the Equal Pay Act [administered by the Wage and Hour Division] and states that the EEOC will no longer be bound by the interpretations of the Department of Labor, Wage and Hour Division. Moreover, the EEOC in 1972 for the first time revised its regulations to add 29 CFR § 1604.9(f), which provides that:

> "It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, *or which differentiates in benefits on the basis of sex.* . . ." [Emphasis Added.]

The majority entirely overlooks the fact that this is inconsistent with prior pronouncements of the EEOC and with the other administrative agencies, including the Department of Labor. Under these circumstances, the most recent EEOC interpretation is entitled to little if any weight. *See General Electric* —— U.S. at ————, 97 S.Ct. at 410–411 where the Court refused to find a Title VII violation even though the employer's plan conflicted with the EEOC regulation. *See also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92–6, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973). It is also significant that this most recent EEOC interpretation is in conflict with the legislative history of the Bennett Amendment.

One must sympathize with the plight of the appellants—a plan drawn up to comply with the regulations of the Wage and Hour Division will inevitably conflict with the recent regulations of the EEOC. This typifies the type of "no win" situation alluded to by the Supreme Court in *General Electric* [—— U.S. at ——, 97 S.Ct. at 410, n. 18], and reinforces my conclusion that the discrimination, if any, fostered by this plan is of a type which did not concern Congress when enacting Title VII.[3] Moreover, the

3. As stated in *General Electric* at ——, 97 S.Ct. at 413:

". . . When Congress makes it unlawful for an employer to 'discriminate . . . on the basis of . . . sex . . .', without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant, . . ." *Cf. Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (CA6 1977).

I wonder, moreover, whether Congress is even concerned with this kind of thing at the present time. For example, the Agency established by Congress to insure pension plans under ERISA, the Pension Benefit Guaranty Corporation, has already recognized the propriety of using sex segregated actuarial tables. *See* 41 F.R. 48484–48491 (1976) where an interim regulation provides for the use of six such tables in the valuation of plan benefits. Additionally, in view of the lack of any definitive guidelines from the Supreme Court after *General Electric*, it would seem that the majority has gone overboard. Even the tax laws, for example, use sex-segregated actuarial tables in

majority does not come to grips with the very serious ramifications of its decision. Unless and until unisex tables are developed, an employer, to comply with the EEOC regulations on equal benefits, may not charge any additional amount to his female employees. In thus forcing the employer himself to cover the added amount necessary to assure equal benefits, this makes the employment of females economically unattractive, a result clearly at odds with the thrust of Title VII.

I would grant the petition for rehearing, set aside the judgment of the lower court and remand for a trial on the issue of whether the distinctions under the plan are mere pretexts designed to effect an invidious discrimination against the members of the female sex.

the computation of annuity income which results in different periodic taxation burdens as between a man and a woman. See 26 U.S.C. § 72(c)(3)(A); Regs. § 1.72-9.

United States Court of Appeals
Ninth Circuit
The Pioneer Courthouse
Portland, Oregon 97204

Chambers of
John F. Kilkenny
Senior Circuit Judge

RECEIVED
OFFICE OF CITY ATT
WATER AND POWER D
MAY 12 1977

May 3, 1977

West Publishing Company
50 W. Kellogg Boulevard
P. O. Box 3526
St. Paul, Minnesota 55165

Attention: Mrs. Catherine Gullickson

Dear Mrs. Gullickson:

Re: Manhart v. City of Los Angeles, Dept. of Water & Power, Nos. 75-2729/2807/2905 [CA9, April 18, 1977].

This will confirm telephone conversation of this date whereby we requested the following changes in the above opinion.

(1) Page 706, line 19, column one - Insert a comma between "Now" and "29".

(2) Page 707, line 3, column one - Underscore the words "Unless and until".

(3) Page 707, line 10, column two - Add footnote 4/ following the word "sex." as follows:

"4/ For that matter, the available writing on the subject would indicate that the use of unisex life tables in connection with pension plans would not result in equal treatment, but rather in unjustifiable discrimination. U. S. Commission on Civil Rights, Civil Rights Digest [Winter 1977, p. 45-6]."

Sincerely,

John F. Kilkenny

DOCKETE

cc:
The Honorable Richard H. Chambers
The Honorable Ben C. Duniway
Mr. Emil E. Melfi, Jr., Clerk

BEST COPY AVAILABLE

Revised: May 5, 1977

ramifications of its decision. Unless and until unisex tables are developed, an employer, to comply with the EEOC regulations on equal benefits, may not charge any additional amount to his female employees. In thus forcing the employer himself to cover the added amount necessary to assure equal benefits, this makes the employment of females economically unattractive, a result clearly at odds with the thrust of Title VII.

I would grant the petition for rehearing, set aside the judgment of the lower court and remand for a trial on the issue of whether the distinctions under the plan are mere pretexts designed to effect an invidious discrimination against the members of the female sex.[4/]

Footnote 4/ [Reference, Page 8]

For that matter, the available writing on the subject would indicate that the use of unisex life tables in connection with pension plans would not result in equal treatment, but rather in unjustifiable discrimination. U. S. Commission on Civil Rights, Civil Rights Digest [Winter 1977, p. 45-6].

APPENDIX E.

Legislative and Administrative History of Acts.

I.

The Equal Pay Act.

In enacting the Equal Pay Act, the 88th Congress specifically intended that employers might continue to classify people as "men" and "women" for compensation purposes so long as the classification involved actual or good faith differences as the basis for the differences in pay and was not a mere subterfuge to pay women less.

1. *The House.*

The House Committee noted that an employer might pay male packagers and female packagers differently where there were real and not merely nominal differences as the basis for the different pay. (109 C.R. 9196, 9209; 2/23/63.) If the male packagers were required to lift heavy boxes and the female packagers were not, more compensation might be paid to the male packagers. Previous cases have so understood the Equal Pay Act. *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970) *cert. den.* 398 U.S. 905; *Ammons v. Zia Co.*, 448 F.2d 116 (10th Cir. 1971).

Congress also specifically intended that the employer would not be required to classify men and women in the *same* way if to do so would penalize the employer by requiring payment of more for work done by one class ("women") than for the same work done by the other ("men").

The House Committee rejected the policy of the administration's bill (109 C.R. 240, 2/21/63), which would require that all distinctions (including longev-

ity) between men and women be disregarded. It did so in two ways: (a) by narrowing the statutory prohibition; (b) by adding exceptions which were not merely "defenses" but which were "exempted from the operation of the statute", and consequently not prohibited.

The Committee Report pointed out that it was prohibiting pay differentials based *solely* on sex and not on some correlated factor. "Supplementary Views" accompanying the Committee Report also announced the rejection of the administration's broad policy. The differences in the two bills were also explained by the Committee on the House floor.[1]

The House Committee Report said in part:

> "Section 2 of the bill (H.R. 6060) amends section 6 of the Fair Labor Standards Act by adding a new subsection thereto. This subsection, in effect, declares that wage differentials based *solely* on the sex of the employee are unfair labor standard. . . . Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that *any* of these exceptions shall be *exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included . . .*" (Emphasis added.)

Logically, this broad general exclusion cannot mean a factor not *correlated* with "maleness"/"femaleness". A pay differential not so correlated would be entirely outside the prohibition of the Equal Pay Act in any

[1] "I think it is important that we have clear legislative history on this point. . . . The clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' . . ." (109 C.R. 9197, 5/21/63.) "The burden would be on the Department of Labor to prove the exceptions are *not* true." (109 C.R. 9208, 5/23/63). (Emphasis added.)

event. Rather, the Act forbids paying women less than men where there are no actual or good faith differences; but it excludes from its prohibition pay differentials where there is a factor of difference—such as "male packagers" lifting heavy boxes, and "female packagers" not including that factor.

Thus the exempt pay differential for "any other factor other than sex" cannot mean a factor not correlated with sex—because in the example given ("male" and "female" packagers), the pay differential is correlated with a classification by sex. It is thus "based on" sex in a general sense, but there is nevertheless an "other factor other than sex" that is the basis for the pay differential. So here the factor is longevity and not sex "solely".

While the "male packagers" example might also be covered by one of the other statutory exceptions, Congress specifically intended the fourth exception to be a *broad* additional exclusion.

If, on the other hand, every factor *correlated* with sex (or "based on" sex) were a prohibited pay differential, then the broad general exclusion would have absolutely no meaning. Exception (iv) of the statute would become an "empty set" as no case would fall within it. To so interpret the exemption would turn it from a "broad general exclusion" into a legal nullity. It would be tantamount to a legislative repeal.

The foregoing conclusion is supported by explicit legislative history on the House floor. Congressman Findley offered an amendment to the bill to add an *additional* exception that would permit differences in wages if there were other costs to the employer in employing women in the same work class as men,

so as not to penalize the employer for so employing women. (109 C.R. 9217.)

This amendment was rejected on the ground that there was no necessity for an *additional* exception as the matter was already covered by exclusion four. The House Committee chairmen and members stated they wanted the legislative history to be clear. Thus, Congressman Thompson (in charge of the bill) said "the language the gentleman [Mr. Findley] would add is redundant"; "the protection the gentleman [Mr. Findley] seeks already exists in the bill. I agree with the gentleman [Mr. Goodell who wrote the bill before the House] that the legislative history should show our intention". Then in direct answer to a direct question from Congressman Pucinski, the Chairman stated that "any other factor other than sex" covered what Congressman Findley was trying to do. (109 C.R. 9217, 5/23/63.)

Thus the controlling legislative history and the explicit language of the House Committee bill (H.R. 6060) which became the law, shows that it is certainly ***not*** the intent of law to require the employer to pay men and women nominally the same amount when the actual effect would be to require the employer to pay women *more* than men for work of the same class.[2]

[2]Both houses considered longevity as a basis for adding the general exception to the Equal Pay Act. (See H.R. 6060, quoted in H.R. Rep. No. 309, 88th Cong. First Sess., 7 (1963); s.1409, quoted in S. Rep. No. 176, 88th Cong. First Sess., 4, 6 (1963). Hearings before the House and Senate in March and April of 1963 placed before Congress the higher cost of retirement benefits for women than for men, and was a factor providing impetus for the addition of the subsection (iv) exception. Hearings on H.R. 3861 and Related Bills, before the Special Sub committee on Labor of the House of Representatives, 88th Cong. 1st Sess. (1963), 103, 184-186 and 241;

2. *The Senate.*

The Senate history shows the same specific intent.

The Senate Sub-Committee (which included Senator Randolph) held hearings and substituted a bill with four exemptions for the Administration's bill. (S. 109 C.R. 2886, 2/25/63.) Senator Randolph was co-author of the Sub-Committee bill (109 C.R. 8915, 5/17/63.) The Senate Committee, in turn, struck three of the exceptions, leaving *only* the fourth—any other factor other than sex. The intent of the Committee bill was that the fourth exception included the other three. The Senate Committee Report accompanying the bill further noted that in addition to the exceptions that the Senate specifically intended to include in the single broad exclusion, it also intended to allow additional exceptions under that broad category where "an employer will be economically penalized by the elimination of a wage differential. . . ." This intent, expressed by the Senate Report, was identical to the intent of Congressman Findley's amendment which the House likewise stated was included in the fourth exemption.

The Senate passed the Senate Committee bill with only the broad fourth exclusion. The House, after adopting H.R. 6060, struck the language of the Senate bill and substituted therefor the language of H.R. 6060. When both bills were then returned to the Senate, Senator Dirksen made the point that he had spoken with those who would be conferees and "there is general agreement that the House language is quite preferable to the language contained in the Senate

Hearings on S. 882 and S. 910 before the Subcommittee on Labor of the Committee on Labor and Welfare, United States Senate, 88th Cong., 1st Sess. (1963) 142 and 145.)

bill." (109 C.R. 9762, 5/28/63.) The Senate thereupon adopted the House bill with the *four* exemptions expressly stated.

The history confirms that Congress did *not* prohibit differentiation upon the basis of sex. Pay differentiation upon the basis of sex is prohibited if, but only if, there is no other factor other than sex that is the basis for the pay differential. The burden is on the plaintiff to show there is no other factor; and here plaintiffs have conceded there is another factor—longevity.

II.
Title VII of Civil Rights Act.

The same 88th Congress which adopted the Equal Pay Act also enacted the Civil Rights Act. The original legislative proposal came from the Justice Department.

1. *House Action.* When Title VII was debated, Congressman Smith (Va.) proposed to add the word "sex" to various sections of the title (110 C.R. 2577 2/8/64). After the amendment was offered, only one serious argument was presented in its favor, first by Congresswoman Griffith and then by others. (110 C.R. 2578-80, 2/8/64). The argument was *not* that discrimination on account of sex should be legislatively treated in the same way as discrimination on account of race or color. The argument was *rather* that the addition of "sex" was necessary to ensure "color blind" application of Title VII among women in the labor market. The *absence* of the amendment, it was urged, could have a practical effect of favoring women of one race, color or religion ahead of women of another race, color or religion, in the labor market (110 C.R. 2579, 2582, 2583, 2584, 2/8/64).

The opposition to the amendment was likewise based on "the experience which the Congress had with respect to the equal pay legislation" and other experience which dictated that legislatively, discrimination on account of sex should *not* be treated in the same way as discrimination on account of race or color. (110 C.R. 2581, 2577-8, 2582).

After the amendment passed on Saturday, Congressman Goodell proposed on Monday adding "sex" as a bona fide occupational qualification. (110 C.R. 2804, 2/10/64.) The Goodell amendment was accepted without question (110 C.R. 2804) even though the House had rejected an amendment to make "race or color" a bona fide occupational qualification. (110 C.R. 2550, 2/8/64.)

Thus, the House did not intend to prohibit all classifications of employees as "male"/"female" (e.g., women nurses to care for women. [110 C.R. 2718, 2/10/64].)

2. *Senate Action.* When the House bill (H.R. 7152) reached the Senate, extensive debate centered on whether the bill should be referred to the Senate Committee already conducting hearings on the Justice Department bill (110 C.R. 3715, 2/26/64). Both Senators Dirksen and Morse favored such referral. One of the major concerns was to establish clear legislative history. (110 C.R. 2884, 3715, 6445-6451).

Extensive debates focused on questions and objections to the House bill, even before the bill was made the pending business. Senator Dirksen introduced a memorandum of objections regarding matters as to which clear legislative intent was desirable. (110 C.R. 3715, 3719, 4754, 6417, 6450, 6455).

The Senate determined to consider the bill on the floor instead of referring to a regular committee (110 C.R. 3719, 4754, 6417, 6455). Four major results followed.

First, Senator Humphrey (floor manager of the entire House bill), Senator Dirksen, and others, formed an *ad hoc* committee to consider the views of all Senators and prepare a substitute bill. The Dirksen-Humphrey, et al., substitute bill was later introduced. It was first introduced as Amendment No. 656, and later as Amendment No. 1052. (110 C.R. 12706-7, 12807, 12817, 12831, 12817, 11926, 11935).

Second, Senators Clark and Case in charge of Title VII of the House bill prepared and introduced interpretive memoranda declaring the intent of that Title. (110 C.R. 7203-59). Additionally, analyses were prepared under the direction of Senator Humphrey *et al.,* distributed to all Senators, and printed in the Record (110 C.R. 7474, 9105, 14464).

One of Senator Dirksen's objections and Senator Clark's explanation of the intent of the House bill dealt directly with the instant case.

> "Objection: The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.
>
> "Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, *except where there is a rational basis for discrimination,* on the ground of bona fide occupational qualification. *The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.*" (110 C.R. 7217) (Emphasis added).

Thus Congress did not intend to outlaw rational differentiation, although the District Court herein held to the contrary.

Third, just before Senators Dirksen and Humphrey introduced their substitute No. 1052, Senator Dirksen yielded the floor to Senator Bennett who introduced his amendment, (No. 1051) regarding the Equal Pay Act.

Procedurally, the Bennett amendment (No. 1051) was proposed to the House bill H.R. 7152. Introducing it *before* the Dirksen-Humphrey amendment (No. 1052) permitted both Senators Dirksen and Humphrey to expressly accept the Bennett amendment as an amendment to *their* bill (No. 1052) and to explain the reason for adding it to their proposal No. 1052. And that is precisely what they did. Both Senators Dirksen and Humphrey explained that the amendment was necessary in order to carry the exemptions of the Equal Pay Act into the Title VII. (110 C.R. 13310, 13647.)

Fourth, as if that were not enough, after the text of No. 1052 as amended by the Bennett amendment was substituted for the House bill (H.R. 7152) and made the bill pending before the Senate, Senator Randolph (co-author of an equal pay bill) asked Senator

Humphrey, manager of the bill on the floor, "a clarifying question" as to the effect of the pending bill on pension plans which differentiate between men and women.

> "Mr. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota (Mr. Humphrey), who is *the effective manager of the pending bill,* a clarifying question on the provisions of title VII.
>
> "I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing.
>
> "*Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefits plans, including earlier retirement options for women may continue in operation under this bill, if it becomes law?*
>
> "Mr. HUMPHREY: *Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment,* so there can be no doubt about it.
>
> "Mr. RANDOLPH. I am grateful for the reply." (110 Cong. Rec. 13663-4, 6/12/74) (Emphasis added).

The Senate, and especially Senator Humphrey was vitally aware of the need to make a legislative record as it did. (110 CR 4858.)

There can be no question that the intent of the Senate was not to prohibit differentiation or classification by sex for purposes of compensation and benefit plans.

3. *House Action.* When the Dirksen-Humphrey bill was passed by the Senate and returned to the House, this point was also made clear in the presentation to the House.

> "The Senate amendment also— . . .
>
> "Second. Provides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex—section 703(b): . . ." (110 C.R. 15896, 7/2/64].

III.

Administrative Authority and Interpretations.

The question of the Courts' responsibility and the legal effect to be given administrative interpretations of the statutes was a matter carefully considered by the 88th Congress, both in regard to the Equal Pay Act, and in regard to Title VII.

Legislative intent is shown by what the Legislature *rejected* as well as by what it adopted. This point is important where, as here, the administration introduces a bill which Congress rejects, and the administration then asks the courts to give effect to the law enacted *as if* the Administration's bill had been enacted, when in fact Congress rejected it. As far as the Administration is concerned, such a practice would seem to exceed the Constitutional duty "to take care that the laws be faithfully executed." (Art. II.)

1. Equal Pay Act. In enacting an equal pay bill, the controlling House Committee Report, and the de-

bates on the House floor show that Congress specifically rejected a proposal to give the administration any quasi-legislative authority. Congress established the Secretary of Labor as a prosecutor, and recognized that as such he had inherent authority to state his position. But his bulletins could only be used in Court as a shield for the defendant, not as a policy-making sword, either as to matters of law or as to matters of fact. It was entitled to weight only in defendant's favor.

The administrator could give "guidance" to those being regulated, but could not give "guidance" to the courts *against* defendant.

The Supplementary Views to the Committee Report stated in part:

> "Since this bill now before the House differs substantially from either last year's proposals or this year's administration bill, we feel that these changes should be pointed out. The following are the major differences between the bill reported by the full Education and Labor Committee and the earlier administration proposal. Under the committee bill:
>
> . . .
>
> "4. Enforcement must be obtained in the Federal Courts and not arbitrarily through an all-powerful administrative body.
>
> . . .
>
> "11. The Secretary of Labor is not given broad regulatory and rule making authority. ['There would be no new regulations' 109 CR 9203.] . . ." House Report No. 309, 5/20/63; U.S. Code, Cong., and Adm. News pp. 689-90; 109 C.R. 9209 *et seq*.

The debates on the House floor showed the same intent:

> "With reference to regulations, we have talked a great deal about this. It is an oversimplification but, generally speaking, *we have three different types of guidance that can be offered by the Administrators to those who are being regulated.* One of them is legislative regulation. . . .
>
> "That was in the original proposal this year and it was in the proposal last year, granting legislative regulatory authority. It is out of this bill. We also knocked out the right of the Secretary of Labor *even to issue interpretative regulations.*
>
> "*I emphasize that interpretative regulations are also barred.* . . . [italics added]
>
> ". . . The Secretary, in my opinion has the inherent authority to write interpretative bulletins. All this amounts to is *telling the public* the Secretary's interpretation of the law for the guidance of those who are to be regulated. *Such bulletins have no standing in court*, but they are there as a guidance to the court as to what the view of the administrator *was. They have no other significance, except that if an employer relies on this interpretative bulletin, he is protected.* He is not in violation if he has done something in reliance upon those interpretative bulletins . . ." (109 C.R. 9208-9209; 5/23/63.) (Emphasis added.)
>
> ". . . The Secretary may believe that a violation exists but the court *will make a second independent judgment*. This is very significant . . . (italics added)

"MR. THOMPSON of New Jersey. Indeed, we are not granting any such authority, but the fact is that we are specifically and categorically restricting it, so that this is a negative action rather than a positive one." (109 C.R. 9198; 5/23/63.)

"Eighth, It is not intended that the Secretary of Labor or the courts will substitute their judgment for the judgment of the employer and his experts who have established and applied a bona fide job rating system." (109 C.R. 9209; 5/23/63.)

2. Title VII. The House Committee adopted the Justice Department civil rights bill with a minimum of debate. However, the House Committee proposed a number of *clarifying* amendments on the House floor. One of these was to insert the word "*procedural*" regulations to make clear that the EEOC had *no* authority as to interpreting *substantive* law. (110 C.R. 2575.) The amendment was added "to make more definite the limitation on his powers". A second was to insert the requirement that there must be "reasonable cause" before the EEOC brings suit. The purpose was "to protect us from an errant and arrogant bureaucracy. . . ." (110 C.R. 2563.) Even as to procedural regulations, public hearing is required. (110 C.R. 2573.)

Under the House bill the EEOC was a prosecutor, just as is the Secretary under the Equal Pay Act. As such the EEOC had inherent authority to announce its position, but the intent of Congress was that the courts exercise their judgment, *independent* of the administrator.

When the bill reached the Senate, the Senate further narrowed EEOC authority.

After Title VII was adopted however, the EEOC, for the considered purpose of creating an erroneous *impression* that the EEOC had authority to interpret the law, and in the expectation that "busy federal judges" would defer to such interpretations, the EEOC "adopted 'guidelines' (since it has no substantive rule-making power)" (Blumrosen, *infra* at 698). It issues such "guidelines" without any public hearing. Further, for the purpose of developing decisional "law", the EEOC decided to give the "reasonable cause" provision the appearance of a quasi-judicial decision (Blumrosen, *infra* at 733). These efforts are extensively described by one of the architects of this EEOC policy, in Blumrosen, "Administrative Creativity: The First Year of the Equal Employment Opportunity Commission, 38 Geo. Wash. L.Rev. 694 (1970) (Compare Constitution Art. II, §3 which provides that the executive "shall take care that the laws be *faithfully* executed").

The result of giving effect to such EEOC pronouncements is that any defendant is denied the independent impartial decision of the judiciary guaranteed by the Constitution and the statutes. While Congress has the *authority* to delegate quasi-legislative and quasi-judicial authority to an administrative agency, yet when Congress has not *exercised* that authority, it is a deprivation of defendant's constitutional and statutory rights for the courts to treat the agency as if such power *had* been delegated to the agency. A defendant is entitled to an impartial, independent, *de novo* decision of the Courts.

IV.
1972 Congressional Action.

In 1972 Congress considered and rejected proposals to broaden Title VII. In rejecting such proposals, it expressly reaffirmed major points of its 1964 action.

In the House, the Committee Report (majority) reflects the original broad legislative proposal. However the House *rejected* that proposal, and adopted a bill proposed by the minority.

Therefore the House Committee Report represents the views Congress *rejected.*

In the Senate, the Committee made major modification in the bill before reporting it to the Senate. Additional major modifications were made on the Senate floor.

The 1972 action is important for three reasons.

First, Congress reaffirmed that *only* those adverse actions that are statutorily defined as unlawful employment practices constitute unlawful discrimination under Title VII. In so doing, Congress rejected proposals to redefine discrimination in terms of "systems and effects" (House Committee Report, U.S. Code, Cong. & Adm. News, 1972, pp. 2143-44, 2150-52).

Second, Congress rejected proposals to give the administrative agency any legal authority to develop a new definition of discrimination, or to exercise *any* quasi-legislative or quasi judicial authority.

Congress again expressly recognized the predilection of the EEOC *not* to follow the will of Congress, and accordingly granted the EEOC an *expressly* partisan position (to bring suit) and *rejected* proposals to give it authority to interpret law or find ultimate facts.

The reason for this action was summed up by the House Committee minority report by members including Congressman Erlenborn, whose substitute bill was adopted by the House. They said in part:

> "We contend that the EEOC has attained an image as an advocate of civil rights, and properly so. For this very reason, we submit that it cannot be an impartial arbiter of the law. An advocate, by nature, represents one side of an issue. How can he then be asked to apply the law without prejudice?" (U.S. Code, Cong. & Adm. News, 1972, p. 2168.)

The floor debates are likewise replete with expressions of concern over bias[3] of the EEOC. (118 C.R. 731, 594, 699, 701.)

Accordingly Congress determined not to give the agency any law-making authority. The Courts are to impartially determine the law. Hence undue deference to the administration gives the agency authority Congress intended it *not* have and not exercise. It also abdicates the courts' responsibility which Congress intended the courts exercise.

Moreover, since the EEOC has been determined by Congress to be an advocate and *not* an impartial administrator, deference to such agency deprives defendants of an *impartial* determination required by the 14th Amendment.

The Congressional decision not to expand the definition of discrimination and to limit the Court's jurisdic-

---

[3]For example, Senator Saxbe said in part, "However, too often we would find—and I speak as a former attorney general who handled the legal aspects of this matter—that in their zealousness to try to protect the civil rights of some people, they were also eager to violate the civil rights of others." (118 C.R. 731; 1/21/72).

tion to the statutory definition of unlawful action is also clear. The original legislative proposal was rejected and the final result of the Congressional action is clearly reflected in the Conference report. It states:

> "1. The Senate amendment required a finding that the respondent engaged in an unlawful employment practice and the House bill required a finding that respondent 'intentionally' engaged in such unlawful employment practice.
>
> . . .
>
> "4. The House bill restated the provisions of existing law prohibiting court ordered remedies based on any adverse action except unlawful employment practices prohibited under Title VII.
>
> . . .
>
> "The Senate receded with an amendment that provides the following:
>
> "1. A finding that the respondent has intentionally engaged or is intentionally engaging in an unlawful employment practice, as the language of the current law reads.
>
> . . .
>
> "4. The provisions of existing law prohibiting court ordered remedies based on any adverse action except unlawful employment practices under Title VII are retained." (Conference Report, U.S. Cong. & Adm. News (1972) v. 2, p. 2183.)

This action by the Congress in 1972 explicitly reaffirmed the action in 1964.

In 1964, the original legislative proposal permitted the courts to apply remedies unless the action of the employer had been "for cause." This implied a very broad authority in the Courts; and that the burden was on the employer to show that the "failure to hire" etc. was for cause.

The House Committee changed the language on the House floor to make clear that actions by the employer "for any reason other" than the prohibited five reasons were *not* unlawful and it is outside the jurisdiction of the court to order remedies unless the employer's was for a prohibited reason. (110 C.R. 2566, 2/8/64.)

When the bill reached the Senate, the Senate added the word "intentional" as a clarifying change. (110 C.R. 12723-4.) Again, as in the House, the view of the *proponents* of the bill was that discrimination was action for a reason and that unlawful discrimination was action for one of the five reasons stated by the statute.[4]

Accordingly the word "intentional" clarified that meaning; but also precluded judicial expansion of the definition.

By reaffirming those jurisdictional limitations, Congress reaffirmed the statutory limits in 1972.

---

[4]The proponents of the legislation repeatedly pointed out that the word "discrimination" (in an unlawful sense) had a settled legal meaning, as it was used in F.E.P.C. statutes in about half the States, as well as in the National Labor Relations Act, the Interstate Commerce Act, and the Federal Aviation Act. See, e.g. 110 Cong. Rec. 6549, 7218, 5803-4, 5437, 7477.

V.
Legislative Intent vs. Interpretive Bulletin in Employer Costs.

The Legislative history flatly contradicts the interpretive bulletin relied on by the Court of Appeals on rehearing (D-3).

For example, the Senate report recognized *additional* exceptions for wage differentials based on other costs. It said:

> "It is the intention of the committee that where it can be shown that on the basis of all of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential, the Secretary can permit an exception *similar to those he can permit for a bona fide seniority system or other exception mentioned above.*" (109 C.R. 8915.)

The agency's interpretation says exceptions on a cost basis would be "contrary to law" because it is unlawful to differentiate upon the basis of sex. Isn't the Memorandum therefore *ultra vires*? It says:

> "To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act."

Obviously the latter bulletin is not a faithful, or logical, interpretation of a statute which says:

> "It shall *not* be an unlawful employment practice . . . for an employer *to differentiate upon the basis of sex* in determining the amount of the wages or compensation paid or to be paid to employees of such employer. . . ."

APPENDIX F.

Charter Sections 220.1(1)(a) and (g).

Sec. 220.1. The Department of Water and Power shall also have the power and duty:

(1) To establish and maintain within said Department a general plan and system of retirement, disability, and death benefits, and, in cooperation with its eligible and participating employees, to provide currently out of the Water Revenue Fund and the Power Revenue Fund a portion of the cost under said plan and system, including expenses incident to the administration thereof, subject, however, to the following provisions, to-wit:

(a) That such plan and system shall be maintained in accordance with sound business practices and recognized actuarial methods, and the respective contributions of said employees and said Department, whether prescribed by present or future provisions of said plan and system, may be modified or adjusted, subject to the direction and approval of the Board of Water and Power Commissioners, whenever the Board of Administration, as hereinafter designated, shall find that said business practices or said actuarial methods require such modification or adjustment;

* * *

(g) That such Board of Administration shall at regular intervals, each not exceeding a period of five years, secure a general survey and actuarial report of said plan and system, and said Board, subject to

the direction and approval of the Board of Water and Power Commissioners, shall from time to time amend said plan and system in such manner as may be found to be advisable to meet changed conditions, or, as in the light of experience, may be considered necessary;

* * *

ORIGINAL

IN THE

Supreme Court of the United States

RECEIVED
JUN 23 1977
OFFICE OF THE CLERK
SUPREME COURT, U.S.

October Term, 1976
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

ERRATA.

Corrections to Petition for Writ of Certiorari.

and

Appendix D to Petition for Writ of Certiorari.

BURT PINES, *City Attorney,*
EDWARD C. FARRELL, *Chief Assistant City Attorney for Water and Power,*
J. DAVID HANSON, *Deputy City Attorney,*
DAVID J. OLIPHANT, *Deputy City Attorney,*
By DAVID J. OLIPHANT, *Deputy City Attorney,*
111 North Hope Street, P.O. Box 111,
Los Angeles, Calif. 90051,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

ERRATA.

Corrections to Petition for Writ of Certiorari.

1. In connection with this submission of Appendix D herewith, please make the following changes in page references to Appendix D in the Petition:

   Page 2, line 26, reference to App. D-4 should be changed to D-6-7

   Page 8, line 3, reference to App. D-13 should be changed to D-18

   Page 11, line 9, reference to App. D-4 should be changed to D-6-7

   Page 16, line 17, reference to App. D-7, 8 should be changed to D-13-15

   Page 18, line 2, reference to App. D-3, should be changed to D-6

   Page 21, line 6, reference to App. D-7, D-8 should be changed to D-13-15

   Page 22, bottom line, reference to App. D-3 should be changed to D-4-5

   Page 24, line 26, reference to App. D-8 should be changed to D-15

   Page 29, line 10, reference to App. D-9 should be changed to D-16

2. Please change references to "Attorneys for Defendants-Appellees" on the front cover and page 36 of the Petition to read "Attorneys for Petitioners".

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

Appendix D to Petition for Writ of Certiorari.

APPENDIX D.

Marie Manhart et al., Plaintiffs-Appellees, v. City of Los Angeles, Department of Water and Power, a body corporate and politic, et al., Defendants-Appellants. Nos. 75-2729, 75-2807 and 75-2905.

United States Court of Appeals, Ninth Circuit. April 18, 1977.

On Petition for Rehearing.

Before CHAMBERS, DUNIWAY and KILKENNY, Circuit Judges.

DUNIWAY, Circuit Judge:

Appellants petition for a rehearing and suggest a rehearing *in banc*. Their principal reliance is upon the decision of the Supreme Court in *General Electric Co. v. Gilbert*, 1976, ... U.S. ...., 97 S.Ct. 401, 50 L.Ed.2d 343, which was decided on December 7, 1976, just two weeks after our decision was filed on November 23, 1976. We conclude that the *General Electric* case does not require a change in our judgment, for several reasons.

First, in that case, as in *Geduldig v. Aiello*, 1974, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256, upon which the Court primarily relied, the facts were different from the facts in the case at bar. In each of those cases, a program of disability insurance was involved, and in each pregnancy was excluded as a disability. The Court held that the exclusion was not a discrimination based upon gender as such. It pointed out that the exclusion of pregnancy as a disability "divides potential recipients [of benefits] into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." *General Electric, supra,* .... U.S. at ...., 97 S.Ct. at 407, quoting from *Geduldig, supra,* 417 U.S. at 496-97, n. 20, 94 S.Ct. 2485. Thus, said the Court, the exclusion of pregnancy "was not in itself discrimination based on sex," .... U.S. ...., at ...., 97 S.Ct. 401, at 407.

The same cannot be said of the pension plan of the Department in the case at bar. A greater amount is deducted from the wages of every woman employee

than from the wages of every man employee whose rate of pay is the same, How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a whole, longevity, and it disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that the difference is not based on sex is to play with words.

In addition, as the Court pointed out in *General Electric,* under the disability programs in that case and in *Geduldig,* "The 'package' going to relevant identifiable groups . . . —male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.' *Geduldig,* 417 U.S. at 496-97, 94 S.Ct. at 2492" *General Electric,* .... U.S. ...., p. ...., 97 S.Ct. 401, p. 409 "[G]ender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive." [*Id.* at ...., 97 S.Ct. at 409 (footnote omitted).

The pension plan in the case at bar is different. The monthly benefit is the same for men and for women, but the cost to women is higher than the cost to men, and this is solely because they are women. Thus the plan is facially discriminatory because, while the plan is all inclusive as to retirement benefits, it is discriminatory, on the basis of sex alone, as to costs to the employees.

Finally the Court's opinion in *General Electric* requires that we reconsider our analysis of the legislative history of the Bennett Amendment (see part II. B.

of our opinion). However, upon that reconsideration, we conclude that a different result is not required in this case. Appellants stress the Court's reliance, in *General Electric,* upon the colloquy between Senators Humphrey and Randolph, discussed in *General Electric* at ..... U.S. ....., at ....., 97 S.Ct. 401 at 412, and in our opinion at ..... (slip op. at 12-13). We did not find it to be persuasive legislative history; the Supreme Court did find it persuasive. We are, of course, bound by that conclusion, but we do not think that it follows that the judgment in this case is erroneous.

In *General Electric,* the Court relied also, and, we think, more heavily, on rulings of the Wage and Hour Administrator construing the Equal Pay Act, and on the fact that EEOC rulings were inconsistent with each other as well as with the rulings of the Administrator (..... U.S. ....., at ....., 97 S.Ct. 401 at 411-412). In our case, there are no such inconsistencies.

In his brief as amicus curiae in this case, the Secretary of Labor points out that he (or the Administrator acting for him) "has never approved a practice of requiring women employees to make contributions to a pension plan which are larger than those required of similarly situated men employees." (Brief at 6) The rulings of the Secretary on which the Department relies do not deal with a requirement that female employees must make greater contributions to the plan than male employees, a requirement which diminishes the current available or "take home" wages of women, as compared to those of men.

In his June 18, 1964 opinion letter (BNA's WHM 95:607), the Administrator disapproved of a wage differential between men and women based upon alleged higher costs of employing women, a part of those costs being for pensions. In an Interpretive Bulletin issued February 11, 1966 (3 F.R. 2657, 29 C.F.R. § 800.151), the Administrator said:

> A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group does not qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purposes of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility.

There are no rulings of the Secretary or Administrator inconsistent with this. The one which the Department cites, issued September 9, 1965, and amended May 6, 1966, 30 F.R. 11504 and 31 F.R. 6770, 29 C.F.R. § 800.116(d) deals with employer contribu-

tions, not compulsory employee contributions which are here involved, and which, under 29 C.F.R. § 800.151 cannot be unequal.

No ruling of EEOC conflicts with 29 C.F.R. § 800.151. Nor has EEOC taken inconsistent positions in relation to the problem before us. Its position is stated in 29 C.F.R. § 1604.9, issued April 5, 1972, 37 F.R. 6836, and in EEOC Dec. #75-146 of Jan. 13, 1975, 2 *CCH Employment Practices* 4190, ¶ 6447, both discussed in our opinion. We know of no prior inconsistent rulings. Thus this case is quite unlike *General Electric,* where there was conflict between EEOC rulings and between rulings of EEOC and those of the Secretary of Labor. Here, the administrative rulings, as they relate to the problem before us, are consistent and support the result that we have reached.

The petition for a hearing is denied. The suggestion of a rehearing *in banc* has been transmitted to all judges of the court, and no judge has requested a vote on the suggestion. Rule 35(b) F.R.App.P. The suggestion of a rehearing *in banc* is rejected.

KILKENNY, Circuit Judge, dissenting:

I share the views of the majority on the jurisdictional issues, but have serious reservations with respect to the manner in which the majority disposes of the appellants' claims in No. 75-2729. In my opinion, they should have been allowed to prove their case.

I am convinced that the legal principles enunciated in *General Electric Co. v. Gilbert,* .... U.S. ...., 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), are here controlling and that the district court erred in granting a summary judgment against the appellants. At a minimum, the court should have conducted a trial on the issue of

whether the appellants' retirement plan was justified on the basis of recognized actuarial tables showing the difference in longevity between males and females. As it now stands, the lower court here made the same mistake as the district court in *General Electric* in its refusal to consider any cost differential defense. As stated by the Supreme Court:

> "The District Court was wrong in assuming, as it did, 375 F.Supp. at 383, that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.'" *General Electric* at ...., 97 S.Ct. at 410, n. 17.[1]

The uncontroverted affidavits in the record before the district court and now before us show clearly that women live substantially longer than men and that the higher female contribution [approximately 15% more than male employees] is fully justified on an actuarial basis. These affidavits further show that this plan, like all annuity plans, is based upon the life expectancy of its beneficiaries, and that mortality tables in use throughout the western commercial world separate male mortality rates from female mortality rates. Moreover, one affiant states that the plan before us was adopted as a result of his 1972 study of the mortality rates of the appellants' employees. The plan follows the "1951 Group Annuity Mortality Table"

---

[1]The Supreme Court also noted that the district court ". . . declined to find that the *present actuarial value* of the coverage was equal as between men and women, . . ." *General Electric,* at ...., 97 S.Ct. at 406. [Emphasis added.]

published in the *Transactions of the Society of Actuaries.*

Consistent with all available studies and plans, this particular plan uses separate mortality tables for men and women and was used to determine the total monies that had to be set aside for the lifetime retirement allowances of employees. Many other relevant facts are set forth in these affidavits, including the undisputed statement that no tables have as yet been developed which measure life expectancy on a *unisex* basis, as required by the majority. Furthermore, these affidavits attest to the fact that unisex mortality tables, if de-developed, could lead to a result which adversely affects the financial integrity of annuity or pension plans such as here before us.

GENERAL ELECTRIC v. GILBERT

Against this background, the majority purports to distinguish *General Electric.* From the general finding in *General Electric* that the exclusion of pregnancy was not in itself discrimination based upon sex, it is apparent to me that the Supreme Court has rejected the broad doctrines espoused by the majority. Moreover, neither *Craig v. Boren,* .... U.S. ...., 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), nor *Califano v. Goldfarb,* .... U.S. ...., 97 S.Ct. 1021, 51 L.Ed.2d .... (1977), detract from what is said in *General Electric.* To summarily conclude, like the majority, that "[t]o say that the difference [here] is not based on sex is to play with words. . . ." is simply an inadequate response to the issues presented. I am of the impression that the majority, rather than the appellants, is playing with words. The appellants' claim deserves more consideration than this conclusory statement.

The majority similarly glosses over the language in *General Electric* regarding the *effect* of the exclusion of pregnancy. The Court recongized that a proper showing of "gender-based effects" may be sufficient to establish a *prima facie* case under Title VII, but it was not there present, and it is not here present.[2] This is made manifest by a comparison of the circumstances here present with those of *General Electric.* As stated in *General Electric:*

> ". . . As in *Geduldig, supra,* [417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974)] *we start from the indisputable baseline that '[t]he fiscal and actuarial benefits of the program . . . accrue*

[2]The Court recognized that a proper showing of cause and effect may be sufficient:

> "The instant suit was grounded on Title VII rather than the Equal Protection Clause, and our cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another. See *Washington v. Davis,* [426 U.S. 229,] 96 S.Ct. 2040, 2051, [48 L.Ed.2d 597] (1976). For example, in the context of a challenge, under the provisions of § 703 (a)(2), to a facially neutral employment test, this Court held that a prima facie case of discrimination would be established if, even absent proof of intent, the consequences of the test were *'invidiously to discriminate on the basis of racial or other impermissible classification,' Griggs v. Duke Power Co.,* 401 U.S. 424, 431, [91 S.Ct. 849, 853, 28 L.Ed.2d 158] (1971). Even assuming that it is not necessary in this case to prove intent to establish a prima facie violation of § 703(a)(1), but cf. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-806 [93 S.Ct. 1817, 1824-1826, 36 L.Ed.2d 668] (1973), *the respondents have not made the requisite showing of gender-based effects." General Electric,* .... U.S. at ....., 97 S.Ct. at 408-409. [Emphasis added.] [Footnotes Omitted.]
>
> Footnote 14 on the same page deals with the burden of proof:
>
> "Respondents, who seek to establish discrimination, *have the traditional civil litigation burden of establishing that the acts they complain of constituted discrimination in violation of Title VII. . . ."* [Emphasis Added.]

to members of both sexes,' 417 U.S., at 497 n. 20, [94 S.Ct. at 2492]. We need not disturb the findings of the District Court to note that there is neither a finding, nor was there any evidence which would support a finding, that the financial benefits of the Plan '*worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program,*' *id.,* at 496 [, 94 S.Ct., at 2492]. The Plan, in effect (and for all that appears), is nothing more than an insurance package, which covers some risks, but excludes others, see *id.,* at 494, 496-497, [94 S.Ct. at 2491-2492]. The 'package' going to relevant identifiable groups we are presently concerned with —General Electric's male and female employees— covers exactly the same categories of risk, *and is facially nondiscriminatory in the sense that* '[*t*]*here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.*' *Geduldig,* 417 U.S., at 496-497, [94 S.Ct., at 2492]. *As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive.* For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits,

accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks. To hold otherwise would endanger the commonsense notion that an employer who has no disability benefits program at all does not violate Title VII even though the 'underinclusion' of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other. Just as there is no facial gender-based discrimination in that case, so, too, there is none here." *General Electric* at ....., 97 S.Ct. at 409-410. [Emphasis Added.] [Footnotes Omitted.]

Similarly, it is obvious here that the fiscal and actuarial benefits of the plan accrue to the members of both sexes. As in *General Electric,* the plan is facially nondiscriminatory to the extent that there is no risk for which one sex is covered and the other is not. Because of the additional contribution made by both the employer and the women employees, the aggregate risk protection for men and women is identical. As a consequence of objectively identifiable characteristics [reflected in actuarial statistics], this plan impacts more heavily upon women than men. [But women live longer than men and ultimately recover as much if not more.] This was also the case in *General Electric* and the Court there refused to find a Title VII violation. Its reasoning is made abundantly clear in Footnote 17, which reads:

> "Absent proof of different values, the cost to 'insure' against the risks is, in essence, nothing more than extra compensation to the employees, in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to

the cost of the 'insurance,' there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the 'extra' disabilities due to pregnancy. While respondents seem to acknowledge that the failure to provide any benefit plan at all would not constitute sex-based discrimination in violation of Title VII, see note 18, *infra,* they illogically also suggest that the present scheme does violate Title VII because

'A female must spend her own money to buy a personal disability policy covering pregnancy disability if she wants to be fully insured against a period of disability without income, whereas a male without extra expenditure is fully insured by GE against every period of disability.' Supplemental Brief for Martha Gilbert, *et al.* on Reargument, at 11. Yet, in both cases—the instant case and the case where there is no disability coverage at all—the ultimate result is that a woman who wished to be fully insured would have to pay an incremental amount over her male counterpart due solely to the possibility of pregnancy-related disabilities. Title VII's proscription on discrimination does not require, in either case, the employer to pay that incremental amount. . . ." *General Electric* at ...., 97 S.Ct. at 409-410.

In one respect, at least, the present facts are more compelling than those of *General Electric* because the employer here was actually paying more for each female

employee than for each male employee. The just quoted language would have allowed the employer/appellants to pay the same amount for each, in which case each female employee would have received less insurance protection than each male employee. If no insurance at all was provided under the plan, each female employee, if she purchased outside insurance, would have to pay more than her male counterpart for the same amount of insurance. In either case, after *General Electric* it is illogical to argue that a Title VII violation would result.

Throughout its opinion, the majority substantially exaggerates the strength of its position. It suggests that the Supreme Court was more concerned with inconsistent administrative interpretations than it was with our original and erroneous view of the legislative history. To support its position, the majority finds that there are no such inconsistencies in the case before us. I disagree.

The Wage and Hour Administrator of the Department of Labor has promulgated a number of regulations. After *General Electric,* I question the vitality of the one quoted by the majority; one [29 CFR § 800.116(d)] noted by the Supreme Court in *General Electric* is more in point. This regulation states

> *"If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than the other.* The mere fact that the employer may make unequal contributions for employees of opposite sexes in such

> a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees." [Emphasis Added.]

The majority's tortured views on the obvious breadth of *General Electric* become apparent in its writing around and failure to accept the Supreme Court's application of this regulation. This regulation, as I read it, contemplates the actuarial equivalent of the scheme before us. If employer contributions are equal for men and women, there is no statutory violation even though the resulting benefits are not equal as between men and women. The majority fails to appreciate the significance of this. In the context of pension plans, this rule makes sense only if it is read to impliedly authorize the funding of employee pension plans upon the basis of separate mortality tables. This regulatory justification for a plan with equal contributions and unequal benefits cannot be ignored in the variation before us.

In 1965, the EEOC promulgated regulations under which it agreed to follow the relevant interpretations of the Wage and Hour Division. 29 CFR § 1604.7(b) provided:

> "*Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor.* These interpretations are found in 29 Code of Federal Regulations, Part 800.119-800.163. *Relevant opinions of the Administrator interpreting 'the equal pay for the equal work standard' will also be adopted by the Commission.*" 30 F.R. 14928. [Emphasis Added.]

This regulation was maintained until the EEOC repealed it in 1972, 37 F.R. 6836. Now 29 CFR § 1604.8 discusses the applicability of defenses raised under the Equal Pay Act [administered by the Wage and Hour Division] and states that the EEOC will no longer be bound by the interpretations of the Department of Labor, Wage and Hour Division. Moreover, the EEOC in 1972 for the first time revised its regulations to add 29 CFR § 1604.9(f), which provides that:

> "It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, *or which differentiates in benefits on the basis of sex. . . .*" [Emphasis Added.]

The majority entirely overlooks the fact that this is inconsistent with prior pronouncements of the EEOC and with the other administrative agencies, including the Department of Labor. Under these circumstances, the most recent EEOC interpretation is entitled to little if any weight. *See General Electric* ..... U.S. at ....., 97 S.Ct. at 410-411 where the Court refused to find a Title VII violation even though the employer's plan conflicted with the EEOC regulation. *See also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92-6, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973). It is also significant that this most recent EEOC interpretation is in conflict with the legislative history of the Bennett Amendment.

One must sympathize with the plight of the appellants —a plan drawn up to comply with the regulations of the Wage and Hour Division will inevitably conflict with the recent regulations of the EEOC. This typifies

the type of "no win" situation alluded to by the Supreme Court in *General Electric* [..... U.S. at ....., 97 S.Ct. at 410, n. 18], and reinforces my conclusion that the discrimination, if any, fostered by this plan is of a type which did not concern Congress when enacting Title VII.[3] Moreover, the majority does not come to grips with the very serious ramifications of its decision. Unless and until unisex tables are developed, an employer, to comply with the EEOC regulations on equal benefits, may not charge any additional amount to his female employees. In thus forcing the employer himself to cover the added amount necessary to assure equal benefits, this makes the employment of females economically unattractive, a result clearly at odds with the thrust of Title VII.

I would grant the petition for rehearing, set aside the judgment of the lower court and remand for a trial on the issue of whether the distinctions under the plan are mere pretexts designed to effect an invidious discrimination against the members of the female sex.

---

[3]As stated in *General Electric* at ....., 97 S.Ct. at 413:

> ". . . When Congress makes it unlawful for an employer to 'discriminate . . . on the basis of . . . sex . . . ', without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant, . . ." *Cf. Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (CA6 1977).

I wonder, moreover, whether Congress is even concerned with this kind of thing at the present time. For example, the Agency established by Congress to insure pension plans under ERISA, the Pension Benefit Guaranty Corporation, has already recognized the propriety of using sex segregated actuarial tables. *See* 41 F.R. 48484-48491 (1976) where an interim regulation provides for the use of six such tables in the valuation of plan benefits. Additionally, in view of the lack of any definitive guidelines from the Supreme Court after *General Electric*, it would seem that the majority has gone overboard.

United States Court of Appeals
Ninth Circuit
The Pioneer Courthouse
Portland, Oregon 97204

May 3, 1977

West Publishing Company
50 W. Kellogg Boulevard
P. O. Box 3526
St. Paul, Minnesota 55165

Attention: Mrs. Catherine Gullickson

Dear Mrs. Gullickson:

Re: Manhart v. City of Los Angeles, Dept. of Water & Power, Nos. 75-2729/2807/2905 [CA9, April 18, 1977].

This will confirm telephone conversation of this date whereby we requested the following changes in the above opinion.

(1) Page 706, line 19, column one—Insert a comma between "Now" and "29".

(2) Page 707, line 3, column one—Underscore the words "Unless and until".

(3) Page 707, line 10, column two—Add footnote 4 following the word "sex." as follows:

"4 For that matter, the available writing on the subject would indicate that the use of unisex life tables in connection with pension plans would not result in equal treatment, but rather in unjustifiable discrimi-

---

Even the tax laws, for example, use sex-segregated actuarial tables in the computation of annuity income which results in different periodic taxation burdens as between a man and woman. See 26 U.S.C. § 72(c)(3)(A); Regs. § 1.72-9.

nation. U.S. Commission on Civil Rights, Civil Rights Digest [Winter 1977, p. 45-6]."

Sincerely,
/s/ John F. Kilkenny
John F. Kilkenny

cc:

The Honorable Richard H. Chambers
The Honorable Ben C. Duniway
Mr. Emil E. Melfi, Jr., Clerk

Revised: May 5, 1977

ramifications of its decision. Unless and until unisex tables are developed, an employer, to comply with the EEOC regulations on equal benefits, may not charge any additional amount to his female employees. In thus forcing the employer himself to cover the added amount necessary to assure equal benefits, this makes the employment of females economically unattractive, a result clearly at odds with the thrust of Title VII.

I would grant the petition for rehearing, set aside the judgment of the lower court and remand for a trial on the issue of whether the distinctions under the plan are mere pretexts designed to effect an invidious discrimination against the members of the female sex.[4]

---

[4]For that matter, the available writing on the subject would indicate that the use of unisex life tables in connection with pension plans would not result in equal treatment, but rather in unjustifiable discrimination. U.S. Commission on Civil Rights, Civil Rights Digest [Winter 1977, p. 45-6].

Supreme Court, U. S.
FILED
NOV 10 1977
MICHAEL RODAK, JR., CLERK

APPENDIX.

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI FILED JUNE 20, 1977. CERTIORARI GRANTED OCTOBER 3, 1977.

APPENDIX.

Page

Complaint (Class Action)—Alleged Violation of Civil Rights, Docket Entry, September 26, 1973 2

Motion to Dismiss First Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted; Notice of Motion; and Memorandum of Points and Authorities in Support of Motion to Dismiss, filed November 21, 1973 3

Civil Minutes—General, Docket January 25, 1974 6

Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, filed March 26, 1974 7

Second Amended Complaint for Declaratory and Injunctive Relief, Back Pay, Credit and Other Appropriate Relief Under the Provisions of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5, as Amended March 24, 1972, the Civil Rights Act of 1871, 42 U.S.C. §1983, the Fourteenth Amendment of the Constitution of the United States, and Article 1, §§1 and 21 of the Constitution of the State of California, filed July 18, 1974 11

Answer to Second Amended Complaint, filed August 9, 1974 25

Notice of Hearing on Motion by Plaintiffs for Preliminary Injunction, filed September 6, 1974 37

Affidavit of Walter L. Risse in Support of Motion for Preliminary Injunction, filed September 6, 1974 38

Page

Affidavit of Alice Muller, filed September 6, 1974 44

Affidavit of Carolyn Mayshack, filed September 6, 1974 49

Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction and Affidavits of Harry M. Church and Allan F. Larson in Support Thereof, filed October 11, 1974 .. 51

Affidavit of Harry M. Church, filed October 11, 1974 82

Affidavit of Allan F. Larson, filed October 11, 1974 86

Memorandum and Order Granting Plaintiffs' Motion for Preliminary Injunction, filed January 15, 1975 92

Preliminary Injunction, filed January 15, 1975 93

Motion for Summary Judgment, filed April 10, 1975 94

Objections to Proposed Findings of Fact and Conclusions of Law; Additional Proposed Findings, filed May 15, 1975 97

Statement of Genuine Issues and Points and Authorities in Opposition to Motion for Summary Judgment, filed May 15, 1975 101

Affidavits of Harry M. Church and Allan F. Larson; and Their Supplemental Affidavits, filed May 15, 1975 101

Page

Affidavit of Harry M. Church, filed May 15, 1975 115

Affidavit of Allan F. Larson, filed May 15, 1975 .. 119

Supplemental Affidavit of Harry M. Church, filed May 15, 1975 125

Supplemental Affidavit of Allan F. Larson, filed May 15, 1975 127

Findings of Fact and Conclusions of Law, filed June 20, 1975 129

Notice of Entry, filed June 20, 1975 133

Judgment, filed June 20, 1975 134

Notice of Appeal, filed July 30, 1975 136

Opinion and Order of the United States Court of Appeals, for the Ninth Circuit, filed November 23, 1976, amended December 23, 1976 138

United States Court of Appeals, for the Ninth Circuit, Docket Entries: Petition for Rehearing, December 9, 1976, Letter Regarding Appellants' Additional Citations, December 16, 1976, Order, December 23, 1976, Appellees Reply to Petition for Rehearing, January 17, 1977 138-139

Opinion and Dissenting Opinion of the United States Court of Appeals, for the Ninth Circuit on Rehearing, filed April 18, 1977 139

Order of the Supreme Court of the United States Granting Certiorari, October 3, 1977 140

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

APPENDIX.

CIVIL DOCKET
UNITED STATES DISTRICT COURT
73-2272-HP

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18, Plaintiffs, vs. CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILIPS [sic], Defendants.

(Docket Entry, United States District Court, Central District of California.)

COMPLAINT (CLASS ACTION)—ALLEGED VIOLATION OF CIVIL RIGHTS.

9/26/73 Fld. Complt. Fld request & ord (KH) for service of process by other than U.S. Marshal naming J. Earle Norris. Issd summs. Md. JS-5.

United States District Court, Central District of California.

Motion to Dismiss First Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted;

Notice of Motion; and

Memorandum of Points and Authorities in Support of Motion to Dismiss.

Marie Manhart, Carolyn Mayshack, Margerie Stoop, Alice F. Muller and Ethel L. Lehman, individually and on behalf of all other persons similarly situated; Committee to Protect Women's Retirement Benefits; and International Brotherhood of Electrical Workers, Local Union No. 18, Plaintiffs, vs. City of Los Angeles, Department of Water and Power, a body corporate and politic; Members of the Board of Water and Power Commissioners of the Department of Water and Power, City of Los Angeles; Members of the Board of Administration of the Department of Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan; Henry G. Bodkin, Jr.; Katherine B. Dunlap; Burton J. Gindler; Michael Glazer; Herbert C. Ward; Louis J. Weidner, Jr.; Ralph E. Powell; Leo W. Sudmeier, Jr.; William D. Sachau; and Robert V. Phillips, Defendants. Civil Action No. 73-2272-HP.

Filed: Nov. 21, 1973.

Defendants herein move the Court as follows:

1. To dismiss the action because the first amended complaint fails to state a claim upon which relief can be granted under the Civil Rights Act, 42 U.S.C. §1983 and therefore jurisdiction of this Court cannot be invoked under 28 U.S.C. §1343(3).

2. To dismiss the action because the first amended complaint fails to state a claim upon which relief can be granted under Federal law with respect to the named members of the Board of Commissioners and the Board of Administration.

3. To dismiss the action because the first amended complaint fails to state a claim upon which relief can be granted assuming arguendo that plaintiffs could state a cause of action with respect to the Civil Rights Act, 42 U.S.C. §1983, and the Federal Constitution, it is nevertheless barred by the Statute of Limitations as to that portion which accrued more than three years prior to the filing of the action herein seeking monetary relief.

4. To dismiss the action since plaintiffs have failed to allege that they have exhausted their administrative remedies, the Court lacks subject matter jurisdiction under the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e et seq. and therefore the first amended complaint fails to state a claim upon which relief can be granted.

5. To dismiss the action because the first amended complaint fails to state a claim upon which relief can be granted with respect to the recovery of any damages or the granting of any other relief prior to the effective date of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e et seq.

6. To dismiss the action because the first amended complaint fails to state a claim upon which relief

can be granted with respect to alleged causes of actions under the Constitution of the State of California.

DATED: November 21, 1973.

BURT PINES, City Attorney

EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power

MADELEINE I. FLIER, Deputy City Attorney

GILBERT W. LEE, Deputy City Attorney

By /s/ Madeleine I. Flier

MADELEINE I. FLIER

Deputy City Attorney

111 No. Hope Street

P.O. Box 111

Los Angeles, California 90051

United States District Court, Central District of California.

Civil Minutes—General.

Case No.: 73-2272-HP.

Date: 1/25/74.

Title: Marie Manhart et al v. City of Los Angeles etc et al.

DOCKET ENTRY: Ent Proc: Hrg deft mot to dismiss, mot granted in part, denied in part. Court decides 3 year statute of limitation applies. Pltf mot for rule 23, class action, determination granted with certain qualifications ordered by the court. Couns to cooperate on preparation of order to submit tor court signature. Pltf to file amended complaint. (HP)

PRESENT: Hon. Harry Pregerson, JUDGE; R. W. Johnson, Deputy Clerk; Charles Bell, Court Reporter.

ATTORNEYS PRESENT FOR PLAINTIFFS: Robert M. Dohrmann; Barbara Miller.

ATTORNEYS PRESENT FOR DEFENDANTS: Madeleine I. Flier, Gilbert W. Lee, Bob Ferm.

PROCEEDINGS: HEARING DEFENDANTS MOTION TO DISMISS; PLAINTIFFS RULE 23 MOTION.

Defendants motion to dismiss granted in part, denied in part.

Plaintiffs class action motion granted with certain qualifications.

Plaintiff to file amended complaint.

Counsel to prepare and submit proposed order for courts signature.

United States District Court, Central District of California.

Order Granting in Part and Denying in Part Defendants' Motion to Dismiss.

[Title Omitted in Printing]

Filed: March 26, 1974.

Defendants' Motion to Dismiss having come on regularly before the Court for hearing, and the Court having considered the various memoranda of law, affidavits and exhibits submitted by the respective parties, and having heard oral argument by the respective parties,

IT IS HEREBY ORDERED:

1. That the following defendants, CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN, and in their representative capacities, HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS, are not "persons" within the meaning of the Civil Rights Act, 42 U.S.C., Section 1983. Defendants' Motion to Dismiss with respect to these defendants is hereby granted.

2. That the following defendants, HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR., RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS, in their individual capacities, are "persons" within the meaning of the Civil Rights Act, 42 U.S.C., Section 1983. Defendants' Motion to Dismiss with respect to these defendants, in their individual capacities, is hereby denied.

3. That the establishment of pension contribution rates is not a quasi-legislative act but is an administrative act, and the following defendants, HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS, in their individual capacities, are not entitled to official immunity under the Civil Rights Act, 42 U.S.C., Section 1983. Defendants' Motion to Dismiss on this ground with respect to these individuals is hereby denied.

4. That defendants' Motion to Dismiss is hereby granted with respect to any purported cause of action under 42 U.S.C., Section 1983, which accrued more than three years prior to the filing of the Complaint herein (September 26, 1973).

5. That plaintiffs' allegation of compliance with the procedural requirements of the Equal Employment Opportunity Act of 1972, 42 U.S.C., Section 2000e, et seq., is sufficient. Defendants' Motion to Dismiss on this ground is hereby denied.

6. That defendants' Motion to Dismiss is hereby granted with respect to any purported cause of action under the Equal Employment Opportunity Act of 1972, 42 U.S.C., Section 2000e, et seq, prior to March 24, 1972.

7. That plaintiffs failed to state a cause of action under the Constitution of the State of California, Article 1, Sections 1 and 21, for money or damages in that defendants are immune from liability for the performance of discretionary acts under the California Government Code. Defendants' Motion to Dismiss as to this purported cause of action is hereby granted.

8. That plaintiffs failed to allege compliance with the California Claims Act. Defendants' Motion to Dismiss is hereby granted with respect to the purported cause of action founded upon Article 1, Sections 1 and 21 of the Constitution of the State of California for money or damages. Plaintiffs are hereby granted leave to amend their complaint to allege compliance with the California Claims Act.

9. That plaintiffs have twenty days from the effective date of this Order in which to file a Second Amended Complaint.

DATED: Mar. 26, 1974.

/s/ Harry Pregerson
HARRY PREGERSON
UNITED STATES DISTRICT JUDGE

PRESENTED BY:
BURT PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant
City Attorney for Water and Power
MADELEINE I. FLIER, Deputy City Attorney
GILBERT W. LEE, Deputy City Attorney
/s/ By Madeleine I. Flier
MADELEINE I. FLIER
Attorneys for Defendants

APPROVED AS TO FORM AND SUBSTANCE:
KATHERINE STOLL BURNS
ROBERT M. DOHRMANN
BARBARA E. MILLER
SCHWARTZ, STEINSAPIR & DOHRMANN
/s/ By Robert M. Dohrmann
ROBERT M. DOHRMANN
Attorneys for Plaintiffs

United States District Court, Central District of California.

Second Amended Complaint for Declaratory and Injunctive Relief, Back Pay, Credit and Other Appropriate Relief Under the Provisions of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5, as Amended March 24, 1972, the Civil Rights Act of 1871, 42 U.S.C. §1983, the Fourteenth Amendment of the Constitution of the United States, and Article 1, §§1 and 21 of the Constitution of the State of California.

[Title Omitted in Printing]

Filed: July 18, 1974.

Count I
Cause of Action Under Title VII

1. The jurisdiction of this Court to grant injunctive and declaratory equitable relief as well as damages is invoked pursuant to Section 706(f) and (g) of the Equal Employment Opportunity Act of 1972, effective on March 24, 1972, amending Title VII of the Civil Rights Act of 1964, and pursuant to 42 U.S.C. §§1331, 1343(3) and (4), 2201 and 2202.

2. On or about June 5, 1973, the plaintiff INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18 (hereinafter "IBEW") filed Charges with the Equal Employment Opportunity Commission, pursuant to Section 706 of Title VII, alleging acts of discrimination solely on the basis of sex. Plaintiff IBEW demanded and received from the Equal Employment Opportunity Commission, by letter dated September 17, 1973, statutory notice, pursuant to Section 706 of the Act, informing the plaintiff, among other things, of the plaintiff's right

to proceed in Court under Section 706(f) of Title VII. As of the date of the filing of this Second Amended Complaint, there has been no attempt at conciliation between the plaintiffs and the defendants, nor is such attempt at conciliation a prerequisite to bringing a civil action in this Court.

3. The plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class is composed of all female employees who are presently working for the defendant DEPARTMENT OF WATER AND POWER (hereinafter "Department") who are members of the Department's Employees' Retirement, Disability, and Death Benefit Insurance Plan (hereinafter "Plan"), all female members of the Plan who retired from the active service of the Department on or after March 24, 1972, all females who resigned from the active service of the Department on or after March 24, 1972 who left contributions on deposit with the Plan, and all females who will become employees of the Department and members of the Plan in the future. The members of this class, consisting of over 2,500 women, are too numerous to be joined in one action.

4. The plaintiffs, MARIE MANHART, ALICE F. MULLER and COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS, have made repeated demands on all of the defendants to alter the sexually discriminatory Plan. The plaintiff IBEW filed a Charge of Sex Discrimination with the Equal Employment Opportunity Commission on behalf of all women discriminated against in the administration of the Plan. The claims of the named plaintiffs are typical of the claims of the other members of the class, the interests of

whom they can diligently, fairly and adequately represent.

5. The Plan requires women to contribute a higher percentage of their salaries in order to receive retirement benefits somewhat similar to benefits received by males. The Plan fails adequately to compensate resigned and retired members of the class for the higher percentage of their salaries which they contributed to the Plan. The question of law common to the class is whether the Plan violates the civil rights protected by Title VII.

6. The defendants have acted, or refused to act, on grounds generally applicable to the class, in that they maintain a sexually discriminatory retirement system, thereby making appropriate relief with respect to the class as a whole.

7. The plaintiff MARIE MANHART, who has recently retired, personally contributed from 1950 to the present nearly $6,000.00 more to the Plan than did her male counterpart. She is informed, and believes, and on this basis alleges, that such money will not be returned to her during her period of retirement.

8. The plaintiff CAROLYN MAYSHACK, a black woman who began working for the Department in May of 1956, now works in its Commercial Division. She provides the sole financial support for two young children, and she and they have been, and presently are being, deprived of some of the necessities of life due to the sexually discriminatory financial burden the defendants have placed upon her in requiring her to contribute, as a condition of continued employment, greater retirement contributions to the Plan than they require of her male counterpart.

9. The plaintiff MARGERIE STOOP, who has been working for the defendants since she was nineteen years of age in 1938, and who now works in their Personnel Division, paid more money to the Plan through August 1, 1973 than did her husband, also an employee of the Department, although his salary was greater than hers. She is informed, believes, and on this basis alleges, that she will not recover the financial loss she has suffered due to the defendants' sexually discriminatory conduct.

10. The plaintiff ALICE F. MULLER, a member of the IBEW, who works in the Power Construction Designing Division of the Department, has paid proportionately more than her male counterpart to the Plan since 1942. She is informed, believes, and on this basis alleges, that absent the assistance of this Court, she will never recover the financial loss which she has suffered, and continues to suffer, because of the defendants' refusal to alter or remedy the Plan.

11. The plaintiff ETHEL H. LEHMAN, a black woman working in the Department's Accounting Division, has been employed for nearly twenty-nine years and has paid, and presently continues to pay, unfair sums into the Plan. She is informed, believes, and on this basis alleges, that the discriminatory practices of the defendants will not cease and she will not be compensated for her losses without the assistance of this Court.

12. The plaintiff COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS (hereinafter "Committee") is an informal association whose members are high ranking supervisory employees of the Department. The Committee's members have suffered and continue to suffer pecuniary loss due to the defendant's

discriminatory Plan. In addition to their personal loss, the members of the Committee feel that, due to their status, they owe a duty to protect the civil rights of the female employees under their supervision.

13. The plaintiff IBEW is an unincorporated labor organization with female members who have worked and are working for the Department and have suffered and continue to suffer pecuniary loss due to the defendant's discriminatory Plan.

14. All the named plaintiffs, the Committee, and the IBEW members of the class are working or have worked for the Department in the City of Los Angeles, State of California, within the Central District of California, and the unlawful employment practices alleged herein were and are being committed within the territorial jurisdiction of this Court.

15. All members of the class who have been, are, or will be employed by the Department have suffered, are suffering, or will suffer from unlawful employment practices committed by the defendants within the territorial jurisdiction of this Court.

16. The Department presently has 12,000 employees, approximately 2,063 of whom are women. Pursuant to Article XXII, Section 220.1 of the Charter of the City of Los Angeles, the Department is empowered to establish and maintain the Plan herein under attack. The Department is an employer within the meaning of Section 701(b) of Title VII, as amended effective March 24, 1972.

17. The defendant BOARD OF COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, created by Article VI, Section 70 of the Charter of the City of Los Angeles, is responsible,

according to Article XXII, Section 220.1(1)(a) of the Charter, for approving and directing the practices of the defendant BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER PUBLIC EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN (hereinafter "Board of Administration") and is therefore an employer or agent of an employer within the meaning of Title VII.

18. The defendant Board of Administration created by Article XXII, Section 220.1(1)(e) of the City Charter, is an agent of an employer within the meaning of Title VII.

19. The defendants HENRY G. BODKIN, JR., KATHERINE B. DUNLAP, BURTON J. GINDLER, MICHAEL GLAZER and HERBERT C. WARD are members of the Board of Commissioners of the Department of Water and Power.

20. The defendants HENRY G. BODKIN, JR., KATHERINE B. DUNLAP, LOUIS F. WEIDNER, JR., RALPH E. POWELL, LEO W. SUDMEIER, JR., WILLIAM D. SACHAU and ROBERT V. PHILIPS [sic] are members of the Board of Administration.

21. All of the defendants, including the individuals, both in their personal and representative capacities, are and at all times pertinent herein have been agents of each other. They have authorized and allowed perpetuation of the sexually discriminatory Plan, thereby contravening the civil rights of the plaintiffs.

22. With respect to the contribution rates required of men and women, the Plan invidiously discriminates against women by arbitrarily requiring higher contribution rates for women. The higher contribution rates are supposedly based on the greater longevity of women.

The plaintiffs allege that there is no criterion, be it longevity or anything else, which lawfully authorizes the discrimination complained of herein.

23. The plaintiffs are informed, believe, and on this basis allege, that the longevity factors utilized by the defendants are based on old statistics which fail to consider the longevity of working women as compared to working men.

24. The Plan's provisions for surviving spouses, which allows such spouses to continue to receive benefits, have an unlawful differential impact on male and female employees. Contributions of female employees which have been and are used to fund this provision of the Plan were and are an undue financial hardship on the female employees. The plaintiffs are informed, believe, and on this basis allege, that under these provisions of the Plan, 671 persons are collecting survivorship benefits, only 3 of whom are spouses of deceased female employees.

25. The Plan is a condition of employment in the Department.

26. As a result of the defendants' continuing sexual discrimination, the plaintiffs are presently suffering an exhorbitant [sic] financial loss, in an amount to be established by proof. The plaintiffs will seek leave of the Court to amend the Complaint when the amount of damages is established, but they now are informed, believe, and on this basis allege, that the amount is in excess of $2,000,000.00.

27. In addition to the actual losses directly attributable to the discriminatory Plan itself, the named plaintiffs, irrespective of their attorneys' time, have spent time and money valued at at least $25,000.00 in order

to persuade, convince or compel the defendants to cease their pattern and practice of sexual discrimination.

28. In the past, the defendants followed a practice of discriminating in respect to retirement ages for men and women. For the purported privilege of being forced to retire at age sixty-two, three years earlier than males were forced to retire, combined with a higher penalty for women for exercising an early retirement option, women were discriminated against by the defendants from 1938 through 1970. For this supposed benefit, which many plaintiffs did not want and did not elect to exercise, some of the plaintiffs paid between 45% and 46% more into the Plan than did their male counterparts. Between 1970 and April of 1972, depending on their ages of entry into the Department's employ and their age when participation in the Plan began, women continued to pay more. If a woman began working at age 20, she paid approximately 24½% more into the Plan than was required of a man; a 30-year-old woman paid approximately 29% more; and a 40-year-old woman paid approximately 31½% more. In April of 1972, in large part in response to an adverse judicial ruling, the defendants equalized retirement ages for men and women. However, the defendants made no attempt to reimburse or compensate, through credit or additional pensions, victims of past discrimination for the excessive salary deductions taken in the past. Therefore, in addition to continuing to pay nearly 15% more at the present time than their male counterparts pay, women are effectively being discriminated against at the present time for the failure of the defendants to make adjustments to eliminate the present effects of past discrimination.

Count II

Cause of Action Under 42 U.S.C. §1983

29. The jurisdiction of this Court to grant injunctive and declaratory equitable relief as well as damages is invoked pursuant to 42 U.S.C. §§1331, 1343(3) and (4), 2201 and 2202.

30. Paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 22, 23, 24, 25, 26, 27 and 28 are incorporated herein by reference.

31. The plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class is composed of all female employees who are presently working for the Department who are members of the Plan, all female members of the Plan who retired from the active service of the Department on or after September 26, 1970, all females who resigned from the active service of the Department on or after September 26, 1970 who left contributions on deposit with the Plan, and all females who will become employees of the Department and members of the Plan in the future. The members of this class, consisting of over 2,500 women, are too numerous to be joined in one action.

32. The plaintiffs MARIE MANHART, ALICE F. MULLER and the COMMITTEE have made repeated demands on all of the defendants to alter the sexually discriminatory Plan. The claims of the named plaintiffs are typical of the claims of the other members of the class, the interests of whom they can diligently, fairly and adequately represent.

33. The Plan requires women to contribute a higher percentage of their salaries in order to receive retirement benefits somewhat similar to benefits received by males.

The Plan fails adequately to compensate resigned and retired members of the class for the higher percentage of their salaries which they contributed to the Plan. The question of law common to the class is whether the Plan violates the civil rights protected by 42 U.S.C. §1983.

34. The Department presently has 12,000 employees, approximately 2,063 of whom are women. Pursuant to Article XXII, Section 220.1 of the Charter of the City of Los Angeles, the Department is empowered to establish and maintain the Plan herein under attack.

35. The Board of Commissioners of the Department of Water and Power, created by Article VI, Section 70 of the Charter of the City of Los Angeles, is responsible, according to Article XXII, Section 220.1 (1)(a) of the Charter, for approving and directing the practices of the Board of Administration.

36. The plaintiffs are informed, believe and on this basis allege that at all times during their tenure in their respective offices as alleged in Paragraphs 19 and 20, all of the defendants have been agents of one another.

37. The plaintiffs are informed, believe and on this basis allege that at all times during their tenure in their respective offices as alleged in Paragraphs 19 and 20, all of the defendants knew of those provisions of the Plan alleged herein, and the defendants knew that such provisions discriminated against women by reason of their sex.

38. The plaintiffs are informed, believe and on this basis allege that at all times during their tenure in their respective offices as alleged in Paragraphs 19 and 20, all of the defendants had reason to know

of those provisions of the Plan alleged herein, and the defendants had reason to know that such provisions discriminated against women by reason of their sex.

39. The plaintiffs are informed, believe and on this basis allege that at all times during their tenure in their respective offices as alleged in Paragraphs 19 and 20, the defendants had authority and power to amend the Plan and eliminate its discrimination against women.

40. The plaintiffs are informed, believe and on this basis allege that the defendants, in performing all of the acts alleged herein, believed that they were acting within the scope of their authority and within and pursuant to the laws of the State of California and of the United States.

Count III

Cause of Action Under the Fourteenth Amendment of the Constitution of the United States

41. The jurisdiction of this Court to grant injunctive and declaratory relief is invoked pursuant to 42 U.S.C. §§1331, 1343(3), 2201 and 2202.

42. Paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 34 and 35 are incorporated herein by reference.

43. The Plan requires women to contribute a higher percentage of their salaries in order to receive retirement benefits somewhat similar to benefits received by males. The Plan fails adequately to compensate resigned and retired members of the class for the higher percentage of their salaries which they contributed to the Plan. The question of law common to the class is whether the Plan violates the equal protection of the laws

as guaranteed to plaintiffs by the Fourteenth Amendment of the Constitution of the United States.

44. The defendant Board of Administration was created by Article XXII, Section 220.1(1)(e) of the City Charter.

Count IV

Cause of Action Under Article 1, §§ 1 and 21 of the Constitution of the State of California

45. The pendant jurisdiction of this Court to grant injunctive and declaratory relief under Article 1, §§1 and 21 of the Constitution of the State of California is hereby invoked.

46. Paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 34, 35 and 44 are incorporated herein by reference.

47. The Plan requires women to contribute a higher percentage of their salaries in order to receive retirement benefits somewhat similar to benefits received by males. The Plan fails adequately to compensate resigned and retired members of the class for the higher percentage of their salaries which they contributed to the Plan. The question of law common to the class is whether the Plan violates the rights protected by Article 1, §§ 1 and 21 of the Constitution of the State of California.

WHEREFORE, the plaintiffs respectfully request that this Court:

1. Rule that the present matter is properly maintained as a class action;

2. Enter a judgment declaring that the acts and practices of the defendants are in violation of the laws and Constitution of the United States, of the Constitution of the State of California, or both;

3. Issue a permanent injunction:

(a) Ordering the defendants to amend the Plan so that contribution rates for males and females are the same;

(b) Ordering the defendants to pay the plaintiffs the amount of money they have contributed in excess of their counterpart male employees due to the defendants' discriminatory Plan; or as an alternative to (b),

(c) Ordering the defendants to credit the accounts of the plaintiffs, such credit to be used for:

(i) An increased retirement allowance, or

(ii) Cessation of contributions until such credit has been exhausted for those plaintiffs who are still employed;

(d) Ordering the defendants to pay the plaintiffs for the time and money expended in their futile efforts to persuade the defendants to comply with the law;

4. Retain jurisdiction over this action and order the defendants to report periodically to the appropriate authority on the defendants' progress in compliance with the terms of this Court's order;

5. Award the plaintiffs the costs of this action together with attorney's fees as is appropriate in civil rights actions and as is specifically provided for in Section 706(k) of the Civil Rights Act of 1964, as amended; and

6. Grant the plaintiffs and the class they represent such other and further relief as may be necessary and proper.

DATED: July 10, 1974.

KATHERINE STOLL BURNS
ROBERT M. DOHRMANN
MICHAEL EVAN GOLD
Schwartz, Steinsapir & Dohrmann

/s/ By Katherine Stoll Burns
KATHERINE STOLL BURNS

/s/ By Michael Evan Gold
MICHAEL EVAN GOLD
Attorneys for Plaintiffs

[Affidavit of Service Omitted in Printing]

United States District Court, Central District of California.

Answer to Second Amended Complaint.

[Title Omitted in Printing]

Filed: Aug. 9, 1974.

Defendants, answering the Second Amended Complaint on file herein, admit, deny and allege as follows:

COUNT I

CAUSE OF ACTION UNDER TITLE VII

1. In answer to the allegations of paragraphs 1, 5, 6, 7, 15, 17, 18, 21, 22, 23, 24, 26 and 28, defendants deny, generally and specifically, each and every allegation contained therein.

2. In answer to the allegations of paragraph 2, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege on or about June 5, 1973, the plaintiff INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18, filed a Charge with the Equal Employment Opportunity Commission, alleging acts of discrimination on the basis of sex. There has been no attempt at conciliation between the plaintiffs and the defendants.

3. In answer to the allegations of paragraph 3, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege with respect to this cause of action, the class includes all female employees presently working for the Department of Water and Power who are members of the Retirement Plan; all female members of the Plan who retired from the active service

of the Department of Water and Power on or after March 24, 1972; and all females who resigned from the active service of the Department of Water and Power on or after March 24, 1972 who left contributions to the Water and Power Retirement Plan on deposit.

4. In answer to the allegations of paragraph 4, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege that some female Department employees have requested that the contribution rates set forth in the Plan be amended.

5. In answer to the allegations of paragraph 8, beginning with the words "The plaintiff CAROLYN MAYSHACK" and ending with the words "Commercial Division", defendants admit the allegations contained therein. In answer to the allegations of paragraph 8, beginning with the words "She provides" and ending with the words "necessities of life", defendants do not have information or belief on the subject sufficient to enable them to answer said allegations, and placing their denial on that ground, deny, generally and specifically, each and every allegation contained therein. As to all other allegations of paragraph 8, defendants deny, generally and specifically, each and every allegation contained therein.

6. In answer to the allegations of paragraph 9, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege that Margerie Stoop, who commenced employment with the Department July 25, 1938 at nineteen and one-half years of age, and who now works in Industrial Relations, contributed more to the

Retirement Fund than her husband, a retired Department employee, and that said plaintiff has not and does not now suffer any loss due to defendants' conduct and that defendants have not and do not now engage in any sexually discriminatory conduct.

7. In answer to the allegations of paragraph 10, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege that plaintiff Alice Muller, who works in the Power Design and Construction Division of the Department has contributed more to the Retirement Fund than a male counterpart would have contributed, and that said plaintiff has not and does not now suffer any financial loss as a result of defendants' refusal to alter the Plan or as a result of any other conduct of defendants.

8. In answer to the allegations of paragraph 11, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege that Ethel H. Lehman, a Black woman working in the Department's Accounting Division, has been employed for approximately twenty six and one-half years, and that said plaintiff has not, and does not now suffer any loss as a result of defendants' practices, and that the defendants have not and do not now engage in discriminatory practices.

9. In answer to the allegations of paragraph 12, beginning with the words "The plaintiff COMMITTEE" and ending with the words "the Department", defendants do not have information or belief on the subject sufficient to enable them to answer said allegations, and placing their denial on that ground, deny, generally and specifically, each and every allegation contained

therein. As to all other allegations of paragraph 12, defendants deny, generally and specifically, each and every allegation contained therein.

10. In answer to the allegations of paragraph 13, beginning with the words "The plaintiff IBEW" and ending with the words "working for the Department", defendants do not have information or belief on the subject sufficient to enable them to answer said allegations, and placing their denial on that ground, deny, generally and specifically, each and every allegation contained therein. As to all other allegations of paragraph 13, defendants deny, generally and specifically, each and every allegation contained therein.

11. In answer to the allegations of paragraph 14, beginning with the words "All the named plaintiffs" and ending with the words "District of California," defendants do not have information or belief on the subject sufficient to enable them to answer said allegations, and placing their denial on that ground, deny, generally and specifically, each and every allegation contained therein. As to all other allegations of paragraph 14, defendants deny, generally and specifically, each and every allegation contained therein.

12. In answer to the allegations of paragraph 16, beginning with the words "The Department presently" and ending with the words "are women", defendants deny, generally and specifically, each and every allegation contained therein.

13. In answer to the allegations of paragraph 19, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege Burton J. Gindler, Herbert C. Ward, Michael Glazer, George H. Kennedy and

Patricia C. Nagle are members of the Board of Water and Power Commissioners.

14. In answer to the allegations of paragraph 20, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege Burton J. Gindler, Herbert C. Ward, Louis F. Weidner, Jr., Ralph E. Powell, Leo W. Sudmeier Jr., William D. Sachau and Robert V. Phillips are members of the Board of Administration.

15. In answer to the allegations of paragraph 27, defendants do not have information or belief on the subject sufficient to enable them to answer said allegations, and placing their denial on that ground, deny, generally and specifically, each and every allegation contained therein.

COUNT II

CAUSE OF ACTION UNDER 42 U.S.C. §1983

16. In answer to the allegations of paragraphs 29, 33, 35, 36, 37, 38, and 39, defendants deny generally and specifically, each and every allegation contained therein.

17. In answer to the allegations of paragraph 30, defendants incorporate their answers to paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 22, 23, 24, 26, 27 and 28 inclusive, as though fully set forth herein.

18. In answer to the allegations of paragraph 31, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege with respect to this cause of action, the class includes all female employees presently working for the Department of Water and Power

who are members of the Retirement Plan; all female members of the Plan who retired from the active service of the Department of Water and Power on or after September 26, 1970; and all females who resigned from the active service of the Department of Water and Power on or after September 26, 1970 who left contributions to the Water and Power Retirement Plan on deposit.

19. In answer to the allegations of paragraph 32, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege that some female Department employees have requested that the contribution rates set forth in the Plan be amended.

20. In answer to the allegations of paragraph 34, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege that Section 220.1 of the Los Angeles City Charter provides in part:

> "The Department of Water and Power shall also have the power and duty:
>
> (1) To establish and maintain within said Department a general plan and system of retirement, disability, and death benefits, and, in cooperation with its eligible and participating employees, to provide currently out of the Water Revenue Fund and the Power Revenue Fund a portion of the cost under said plan and system, including expenses incident to the administration thereof, subject, however, to the following provisions, to-wit:"

21. In answer to the allegations of paragraph 40, defendants deny, generally and specifically, each and every allegation contained therein, and in connection

with said denial allege that at all times herein defendants acted and continue to act in good faith and in compliance with all federal and state laws applicable thereto.

COUNT III

CAUSE OF ACTION UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

22. In answer to the allegations of paragraphs 41 and 43, defendants deny, generally and specifically, each and every allegation contained therein.

23. In answer to the allegations of paragraph 42, defendants incorporate their answers to paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 26, 27, 28, 31, 32, 34 and 35 inclusive, as though fully set forth herein.

COUNT IV

CAUSE OF ACTION UNDER ARTICLE I, §§1 and 21 OF THE CONSTITUTION OF THE STATE OF CALIFORNIA

24. In answer to the allegations of paragraphs 45 and 47, defendants deny, generally and specifically, each and every allegation contained therein.

25. In answer to the allegations of paragraph 46, defendants incorporate their answers to paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 26, 27, 28, 31, 32, 34 and 35 inclusive, as though fully set forth herein.

AS A FIRST, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE, DEFENDANTS ALLEGE:

That the Second Amended Complaint fails to state a claim upon which relief can be granted under the

Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e et seq. (hereinafter "EEOA").

AS A SECOND, SEPARATE
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That plaintiffs failed to exhaust the administrative remedies which are provided under the EEOA.

AS A THIRD, SEPARATE
AND DISTINCT AFFIRMATIVE
DEFENSE, DEFENDANTS ALLEGE:

That the class cannot be properly maintained under the EEOA to include those individuals on whose behalf no charges were filed with the Equal Employment Opportunity Commission.

AS A FOURTH, SEPARATE
AND DISTINCT AFFIRMATIVE
DEFENSE, DEFENDANTS ALLEGE:

That the Second Amended Complaint fails to state a claim upon which relief can be granted with respect to the recovery of any money or damages or any other relief prior to March 24, 1972—the effective date of the EEOA.

AS A FIFTH, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the defendants may use different mortality tables with respect to male and female members of the Retirement Plan pursuant to a bona fide occupational qualification.

AS A SIXTH, SEPARATE
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the Second Amended Complaint fails to state a claim upon which relief can be granted under the Civil Rights Act, 42 U.S.C. §1983.

AS A SEVENTH, SEPARATE,
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the Second Amended Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. §1983 with respect to the named members of the Board of Commissioners and the Board of Administration in their individual capacities.

AS AN EIGHTH, SEPARATE
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the members of the Board of Commissioners and the Board of Administration are immune from Civil Rights actions under 42 U.S.C. §1983.

AS A NINTH, SEPARATE
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the individual members of the Board of Commissioners and Board of Administration have acted and continue to act in good faith at all times herein.

AS A TENTH, SEPARATE
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That plaintiffs are barred by the California Statute of Limitations from the recovery of any money or

damages or any other relief prior to September 26, 1970 under either the Civil Rights Act, 42 U.S.C. §1983 or the Fourteenth Amendment to the United States Constitution.

AS AN ELEVENTH, SEPARATE
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the Second Amended Complaint fails to state a claim upon which relief can be granted under the Fourteenth Amendment to the United States Constitution.

AS A TWELFTH, SEPARATE
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the Second Amended Complaint fails to state a claim upon which relief can be granted under Article 1, Sections 1 and 21 of the Constitution of the State of California.

AS A THIRTEENTH, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That failure to allege compliance with the California Claims Act and the Charter of The City of Los Angeles bars the maintenance of a suit against defendants for money or damages.

AS A FOURTEENTH, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the individually named members of the Board of Commissioners and the Board of Administration

are not liable under Article 1, Sections 1 and 21 of the Constitution of the State of California for their discretionary acts.

AS A FIFTEENTH, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the provisions of the Retirement Plan of which plaintiffs complain constitute part of their contract of employment with the Department of Water and Power by which they and the Department are both bound.

AS A SIXTEENTH, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the Retirement Plan is designed to provide equal retirement benefits to its members.

AS A SEVENTEENTH, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That plaintiffs are barred by the equitable doctrines of laches and estoppel from recovery of any relief in the action herein.

WHEREFORE, defendants pray:

1. That plaintiffs take nothing by this action;

2. That defendants be dismissed and recover their costs in this action; and

3. That defendants be granted such other and further relief as the Court may deem proper, including defendants' reasonable attorneys' fees.

DATED: August 9, 1974.

BURT PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power
GILBERT W. LEE, Deputy City Attorney

/s/ By Gilbert W. Lee
GILBERT W. LEE
Deputy City Attorney

111 No. Hope Street
P.O. Box 111
Los Angeles, California 90051

Attorneys for Defendants

[Affidavit of Service Omitted in Printing]

United States District Court, Central District of California.

Notice of Hearing on Motion by Plaintiffs for Preliminary Injunction.

[Title Omitted in Printing]

Filed: Sept. 6, 1974.

TO: CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, ET AL. AND TO THEIR ATTORNEYS, BURT PINES, CITY ATTORNEY, EDWARD C. FARRELL, CHIEF ASSISTANT, AND GILBERT W. LEE, DEPUTY CITY ATTORNEY:

PLEASE TAKE NOTICE that, pursuant to Rule 65 of the Federal Rules of Civil Procedure, the plaintiffs will move this Court, at Courtroom 17, United States Courthouse, 312 North Spring Street, Los Angeles, California, on Monday, September 23, 1974 at 10:00 a.m., or as soon thereafter as counsel may be heard, for a preliminary injunction requiring the defendants to equalize the contribution rates for male and female employees of the Department of Water and Power, based on the attached Statement of Reasons and Memorandum of Points and Authorities and the Affidavits of Walter L. Risse, Carolyn Mayshack, and Alice Muller.

Dated: September 6, 1976

KATHERINE STOLL BURNS
ROBERT M. DOHRMANN
MICHAEL EVAN GOLD
SCHWARTZ, STEINSAPIR & DOHRMANN

/s/ By M. Gold
MICHAEL EVAN GOLD
Attorneys for Plaintiffs

United States District Court, Central District of California.

Affidavit of Walter L. Risse in Support of Motion for Preliminary Injunction.

[Title Omitted in Printing]

Filed: Sept. 6, 1974.

State of California, County of Los Angels—ss.

Walter L. Risse, being duly sworn, deposes and says:

I am the business manager at the International Brotherhood of Electrical Workers, Local 18, an unincorporated labor organization with its principal place of business in Los Angeles, California. Approximately *4500* of our members are presently employed in the Department of Water and Power in Los Angeles, and approximately *1000* are retirants from the Department of Water and Power.

On or about June 5, 1973, I filed a charge with the Equal Employment Opportunity Commission, stating that the Department of Water and Power of Los Angeles. the Board of Water and Power Commissioners, the Board of Administration and the Administrator and the Secretary of the Department of Water and Power Employees' Retirement Disability and Death Benefit Plan were engaged in a pattern and practice of sex discrimination against the female employees of the Department of Water and Power. A true copy of that charge is attached to this Affidavit as Exhibit A and is incorporated herein by reference.

On September 17, 1973 or a few days thereafter, I received from the United States Department of Justice a Notice of Right to Sue within 90 days concerning

the charge of discrimination mentioned above. A true copy of that notice is attached to this Affidavit as Exhibit B and is incorporated herein by reference.

/s/ Walter L. Risse
WALTER L. RISSE

Subscribed and sworn to before me this 4th day of September, 1974.

/s/ Signature: Michael Evan Gold
Notary Public in and for
said County and State

[Seal]

EXHIBIT A.

CHARGE OF DISCRIMINATION

EXHIBIT A.

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

1. Your Name: International Brotherhood of Electrical Workers, Local Union No. 18; Phone Number: 387-8274; Street Address: 4189 West Second Avenue; City: Los Angeles; State: California; Zip Code: 90004.

2. Was the Discrimination Because of: Race or Color, No; Religious Creed, No; National Origin, No; Sex, Yes.

3. Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all. Name: Department of Water & Power of the City of Los Angeles; Street address: 111 North Hope Street; City: Los Angeles; State: California; Zip Code: 90013; and (other parties if any) Board of Water and Power Commissioners, Board of Administration and the Administrator, Secretary of the Department of Water & Power's Retirement, Disability and Death Benefit Plan.

4. Have you filed this charge with a state or local government agency? No.

5. If your charge is against a company or a union, how many employees or members? Over 25.

6. The most recent date on which this discrimination took place: Month Continuing.

7. Explain what unfair thing was done to you. How were other persons treated differently? (use extra sheet if necessary.) The parties enumerated in No. 3 above have engaged in a pattern and practice of sex discrimination against all their female employees, including those women who are members of and are represented by IBEW, Local 18. Women are arbitrarily required to make contributions to and receive benefits from the Retirement, Disability and Death Benefit Plan which are not comparable to the contributions and benefits paid and received by male employees.

8. I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief. Date: June 5, 1973; /s/ Walter L. Risse, Business Manager.

Subscribed and sworn to before me this 5th day of June 1973.

/s/ Sandra E. Abrahamian
Notary Public

EXHIBIT B.

United States Department of Justice
Washington, D.C. 20530

Notice of Right to Sue
Within 90 Days

Sept. 17, 1973

Mr. Walter L. Risse, Business Manager
IBEW Local No. 18
4189 West Second Avenue
Los Angeles, California 90004

Re: EEOC Charge Against City of Los Angeles Department of Water and Power
No. TLA 3-2123

Dear Mr. Risse:

Because your organization has filed a charge against the respondent(s) named above with the Equal Employment Opportunity Commission and the Commission has dismissed that charge, and no suit based on that charge has been filed by this Department, you are hereby notified that any person claiming to be aggrived [sic] has the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*, against the above named respondent(s).

If you choose to commence a civil action, such suit must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice.

If you are unable to retain an attorney, the Court is authorized in its discretion to appoint an attorney to represent you and to authorize commencement of

the suit without payment of fees, costs, or security. In order to apply for an appointed attorney, you may take this Notice, along with any correspondence you have received from the Justice Department or the Equal Employment Opportunity Commission, to the Clerk of the United States Court in Los Angeles, California.

Your attorney may inspect the investigative file pertaining to your case at a time and place convenient to the parties. That file is located in the EEOC District Office, at 1543 West Olympic Blvd., Suite 340, Los Angeles, California 90015.

We request that you send this Department a copy of any complaint initiating suit.

This notice should not be taken to mean that an agency of the United States has made a judgment as to whether or not your charge is meritorious.

Sincerely,

J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

By: /s/ Douglas B. Huron
DOUGLAS B. HURON
Attorney
Employment Section

cc: Mr. Lorenzo H. Traylor, Director
EEOC District Office
1543 West Olympic Blvd., Suite 340
Los Angeles, California 90015

Mr. Robert Dohrmann, Esquire
Schwartz, Steinsapir & Dohrmann
6404 Wilshire Blvd., Suite 950
Los Angeles, California 90048

United States District Court, Central District of California.

Affidavit of Alice Muller.

[Title Omitted in Printing]

Filed: Sept. 6, 1974.

State of California, County of Los Angeles—ss.

Alice Muller, being duly sworn, deposes and says:

I am the chief clerk of the power design and construction division of the Department of Water and Power.

Female members of the Department of Water and Power Employees' Retirement, Disability, and Death Benefit Plan contribute 114.84% of their male counterparts' contributions. Contributions to the Plan are a condition of employment in the Department.

The Department employs approximately 12,000 persons, of whom approximately 1,900 are female. The vast majority of the female employees of the Department are working within the Central District of California.

There are approximately 400 women who are surviving spouses of Department employees who are presently receiving surviving spouse benefits, while there are approximately 3 men who are surviving spouses of Department employees who are receiving surviving spouses benefits.

I feel really disheartened that a great and usually forward-looking organization, as the Department of Water and Power surely is, does not give women equal employment opportunities with men. I feel that I have given every bit as much of myself, my mind, my heart, my energy, to the Department as a male em-

ployee. In return, I feel that the Department should want, as a useful management tool, to provide me with benefits equal to those provided male employees.

As late as the 1950's, Department women who were qualified by experience, education, seniority, and civil service test scores were often not given even the courtesy of a job interview because women were rarely considered for promotion. In those days, it would not have occurred to most of us women to file a grievance, if there had been such a process, even when the men who were appointed ahead of us were less qualified than we were, because double standards in business were accepted as the norm. Today that has improved, and women are generally given equal job opportunities and equal pay.

Unfortunately, the Department's retirement plan remains mid-Victorian. At the inception of the Plan in 1938, women were regarded as the weaker sex and benefited from "chivalrous" attitude of management. We were given the privilege of early retirement at age 55 (5 years earlier than men) and mandatory retirement at age 60 (5 years earlier than men). For those privileges, we women contributed our fair share, and as time went on, more than our fair share, to the Plan to compensate for our fewer working years and longer life expectancies.

In June, 1957, women received mixed blessings from the Plan. Our mandatory retirement age was increased to 62, ostensibly to coincide with the lowered retirement age for women with social security coverage (which we do not have). However, the Plan neglected to revise its retirement contribution schedule, and our monthly contributions continued to be deducted on

the basis of mandatory retirement at age 60. It was not until 1969, twelve years later, that the plan corrected our retirement contributions to reflect the change. To my knowledge, the twelve years of unfair and exorbitant contributions have never been adjusted.

In late 1972, sensing that changes in the Plan were imminent, a group of Department women banded together, very informally, as the Committee To Protect DWP Women's Retirement Benefits. We took the following action:

(1) On November 7, 1972, we addressed a letter to the administrator of the Plan, Allan F. Larson, setting forth our complaints. To date, we have not received an answer to this letter.

(2) A Department Management bulletin, dated November 22, 1972, invited employees to comment before the Board of Administration of the Plan on contemplated changes. Three members of the committee, Loma Bent, Mary Born, and I commented at the meeting of December 7, 1972. The Board, to date, has not acknowledged our presence at the meeting, nor answered any of our questions.

(3) At the request of the Department's General Manager, Robert V. Phillips, in February of 1973, four representatives of the committee (Loma Bent, Mary Born, Marie Manhart, and I) met with Mr. Phillips, Mr. Larson and the Department's attorney, Madeleine Flier. We committee women reiterated the information and questions contained in our original letter and our comments made before the Retirement Board. Mr. Phillips asked a number of pertinent questions, which led us to believe that he understood what we were asking for and that our requests were neither

outrageous nor stupid. Mr. Larson and Mrs. Flier remained uncommunicative during the entire meeting. None of the three attempted in any way to answer any of our questions during the discussion. To date, none of these persons has answered any of our questions.

(4) Water and Power Board Commissioner, John Luhring, who was also a member of the Board of Administration, contacted our committee and asked for a discussion with us. Loma Bent, Mary Born, Marie Manhart and I met with him in March of 1973. He asked many pertinent questions, and again, we felt that he understood our requests. On March 22, 1973, at a regular meeting of the Board of Administration, Mr. Luhring presented our comments and asked that they be transcribed and distributed to each board member for further study. He also requested that the plan actuary formulate a reply. To date, to my knowledge, there has been no further discussion to Mr. Luhring's request in any meeting of the Board of Administration, and the plan actuary has not presented information of any kind regarding retirement contributions of female employees.

I feel the committee has exhausted the traditional ways and means of communication through channels. All of our efforts have been to the unseeing, unhearing, unspeaking persons who take our contributions and refuse us information and consideration. I feel the Department is acting immorally and illegally.

/s/ Alice F. Muller
ALICE MULLER

Subscribed and sworn to before me this 5th day of September, 1974.

Signature: /s/ Michael Evan Gold
Notary Public in and for
said County and State

[Seal]

United States District Court, Central District of California.

Affidavit of Carolyn Mayshack.

[Title Omitted in Printing]

Filed: Sept. 6, 1974.

State of California, County of Los Angeles—ss.

Carolyn Mayshack, being duly sworn, deposes and says:

I am a black woman, and I provide the sole support for myself and my two children, aged 7 and 12. I am an employee of the Department of Water and Power.

My gross salary from the Department of Water and Power is $451.52 every two weeks. From this sum are deducted payments for Federal and State income tax, and $57.23 is deducted from every other check as my contribution to the retirement plan. Out of my monthly salary, there is available to me $615.00 per month for consumption.

The following are my fixed monthly expenses:

Rent	$185.00
Parking	6.00
Utilities	35.00
Food	175.00
Gas and Oil	25.00
Auto Insurance	20.00
Household Insurance	3.50
Dental Insurance	5.00
Medical Insurance	40.00
TOTAL	$494.50

The following are my flexible monthly expenses:

Credit Union Loan	68.00
Entertainment, Savings, Furniture and Appliances, Auto Repairs, Clothing	37.50

/s/ Carolyn E. Mayshack
CAROLYN MAYSHACK

Subscribed and sworn to before me this 5th day of September, 1974.

Signature: /s/ Michael Evan Gold
Notary Public in and for said County and State.

[Seal]

United States District Court, Central District of California.

Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction and Affidavits of Harry M. Church and Allan F. Larson in Support Thereof.

[Title Omitted in Printing]

Filed: Oct. 11, 1974.

I

THE DEPARTMENT OF WATER AND POWER'S RETIREMENT PLAN, WHICH USES SEPARATE MORTALITY TABLES FOR MEN AND WOMEN, COMPLIES WITH TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED IN 1972 (42 U.S.C. §2000e et seq.)

With respect to plaintiffs' cause of action founded upon Title VII of the Civil Rights Act of 1964, as amended in 1972 (42 U.S.C. §2000e et seq.), this is a case of first impression. None of the cases cited by plaintiffs in their Memorandum of Points and Authorities involves a fact pattern such as in this case.

Plaintiffs rely quite heavily upon a decision of the Equal Employment Opportunity Commission (hereinafter "EEOC") 74-118, issued April 26, 1974. As we shall set out in detail later, the EEOC's interpretation in that decision reflects a recent change of position.

Moreover, the United States Supreme Court's opinion in *Geduldig v. Aiello,* .... U.S. ...., 41 L. Ed.2d 256, 94 S. Ct. 2485 (June 1974), which was filed after the EEOC decision, casts serious doubts about the soundness of that decision.

By way of background, the Department's Retirement Plan (hereinafter "Plan") is a self-insured Plan that provides benefits for over 16,000 active and retired members. The Plan is designed to follow a single policy for men and women, i.e., women pay an equal proportion of the total cost of their benefits as men pay for theirs and the resulting monthly benefits for men and women are equal (Affidavit of Harry M. Church). In order to effectuate this single policy for men and women, the Department has recognized a fact which is established by reliable statistical data and of which this Court can take judicial notice—women have a longer life expectancy than men. (*Reed v. Reed,* 404 U.S. 71, 75, 30 L.Ed.2d 225, 92 S. Ct. 251 (1971)); *Gallentine v. Fiero,* 110 Cal. App. 345, 346, 294 P.59, 60, (1930). Since Department women live longer than Department men, the total payout to the woman is greater and since a single policy for both sexes must be maintained, it necessarily follows that the contribution rates of women must be higher than men (Affidavit of Harry M. Church).

Observed differences in mortality between men and women are not unique to the Department but are reflected in data for the general population as well as in data for the insured population.

The U.S. Census Bureau collects statistics for the entire population which show appreciably lower mortality rates for women than for men at all ages.[1] This phenomenon is not unique to the United States. The United Nations reports lower mortality rates for women

[1]"Life Tables," *Vital Statistics of the United States, 1970,* Vol. 2, Section 5, U.S. Department of Health, Education and Welfare, pp. 7-14.

than men throughout the world.[2] A notable exception is India, but even there the mortality rates for women above age 40 (once childbearing years are over) are appreciably lower than for men. The phenomenon is not recent. Sweden has maintained mortality statistics since 1780, and for the entire period, female mortality rates have been lower than male mortality rates.[3]

The Social Security Administration collects mortality data on workers, retired workers and other Social Security beneficiaries. These show higher differences in mortality between men and women than do the census statistics for the general population.[4]

Even though the observed differences in mortality have continued over the past 20 years—a period during which women's roles in the working force have drastically changed—it might be argued that these differences are explainable solely in terms of socio-economic differences. However, perinatal mortality rates (i.e., stillbirths occurring beyond the 20th week after conception and deaths in the first week of infancy) are over 20 percent higher for males than females.[5]

Evidence that the differences in mortality between the sexes are widening while the differences in their roles in society are narrowing comes from the *Metropolitan Life Statistical Bulletin,* December 1971. This

[2]*Demographic Yearbook 1970,* United Nations, 1971, Table 20, pp. 710-729.

[3]Keyfitz, N. and Flieger, W., *World Population:* An Analysis of Vital Data, Chicago: University of Chicago Press, 1968, pp. 604-637.

[4]Bayo, Francisco, "Mortality of the Aged," *Transactions, Society of Actuaries,* Vol. XXIV, Part 1, pp. 1-24.

[5]"Reduction in Perinatal Mortality," *Metropolitan Life Statistical Bulletin,* Vol. 43 (May 1962), pp. 6-8.

Bulletin shows that since 1920 the ratio of male to female mortality has increased by more than 60 percent.[6] Thus, it is indisputable that women live longer than men, and this difference in longevity is the basis for the Department's Retirement Plan which is actuarially designed to provide equal benefits for men and women.

While plaintiffs concede that women live longer than men and that the Department's Plan provides equal monthly benefits to both men and women, they mistakenly analogize this case to cases involving employment status, i.e. initial employment, promotional opportunities, retirement or termination. This mistake causes plaintiffs to fail to recognize the adverse impact on the compensation paid to Department men and women if contribution rates are equalized. Section 703(a) of Title VII (42 U.S.C. §2000e-2) provides, *inter alia*, that it shall be an unlawful business practice for an employer to discriminate against any individual with respect to his or her compensation.

There can be little dispute that pension provisions of a city charter are created, not as gratuities, but as an indispensable part of the contract of employment between the city and its employees, creating a right to pension benefits as an integral part of compensation. (*Abbott v. City of San Diego*, 165 Cal.App. 2d 511, 517, 332 P.2d 324, 328 (1958) Hearing denied (1959)). By rendering service for the period required, or by attaining a specified age, under the Plan, Department employees' rights to retirement benefits are earned and are in the nature of delayed compensation.

[6]Sex Differentials in Mortality Widening," *Metropolitan Life Statistical Bulletin*, Vol. 52 (December 1971), pp. 3-6.

(*Rochester Corporation v. Rochester*, 450 F.2d 118, 121 (4th Cir. 1971); *Inland Steel Co. v. National Labor Relations Board*, 170 F.2d 247, 250-1 (7th Cir. 1948) cert. den. 336 U.S. 960). Since we are involved here with compensation, i.e. retirement contributions and benefits, the question that arises is whether the Department's Retirement Plan comes within the exception to Section 703(a), that part of Section 703 (h) was known as the Bennett Amendment (42 U.S.C. §2000e-2(h)). Defendants submit that it does.

The Bennett amendment provides:

> "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))." [Subsection (d) was added by the Equal Pay Act of 1963, 77 Stat. 56.]

The intent of this amendment was to incorporate into Title VII the defenses that were permitted by the Equal Pay Act which was passed by the Congress and which had taken effect June 11, 1964. This intent is clearly disclosed by the colloquy in 110 Cong. Rec. 13647 (June 12, 1964):

> "MR. BENNETT. Mr. President, I yield myself 2 minutes. I call up my amendment No. 1051 and ask that it be read.
>
> THE PRESIDING OFFICER. The amendment will be stated. The legislative clerk read as follows:

On page 44, line 15, immediately after the period, it is proposed to insert the following new sentence: "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

"MR. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.

By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.

The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.

I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand [sic], I shall ask that the amendment be voted on without asking for the yeas and nays.

Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.

Mr. DIRKSEN. Mr. President, I yield myself 1 minute.

We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.

All that the pending amendment does is recognize those exceptions, that are carried in the basic act.

Therefore, this amendment is necessary, in the interest of clarification.

The PRESIDING OFFICER. (Mr. Ribicoff in the chair). The question is on agreeing to the amendment of the Senator from Utah. (Putting the question.)

The amendment was agreed to."

Senator Bennett's remarks that sufficient attention had not been given to possible conflicts between the Civil Rights bill and the Equal Pay Act because of the wholesale insertion of the word "sex" in the bill was in apparent reference to the Smith amendment in the House Bill which added that term the day before the House sent its bill over to the Senate. Congressman Smith conceded he acted in haste in offering his amendment (which was agreed to by the House), and that he overlooked a number of areas where the term "sex" should have been added (110 Cong. Rec. 2718, 2720, Feb. 10, 1964). (See also Congresswoman Green's remarks (110 Cong. Rec.

2720, Feb. 10, 1964) pointing out that Congressman Smith's sex amendment was not given "full and careful consideration.") The Congressional debate of the Equal Pay Act did not suffer from this defect. The Bennett amendment makes it clear that the standards of the Equal Pay Act were to apply in the Civil Rights Act.

That the intent of the Bennett amendment was to preserve differences in pension and retirement benefits between men and women is clearly stated in the colloquy[7] between Senator Humphrey, the floor manager of the Civil Rights Bill in the Senate, and Senator Randolph as follows (110 Cong. Rec. 13663-64, June 12, 1964):

> "Mr. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota [Mr. HUMPHREY], who is the effective manager of the pending bill, a clarifying question on the provisions of title VII.
>
> I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing.

[7]The Court in *Gruenwald v. Gardner*, 390 F.2d 591, 593 (2d Cir. 1968), Cert. Den. 393 U.S. 982 (1968), apparently had this legislative history in mind when it observed that variations in the amounts of retirement benefits based upon differences in the attributes of men and women do not violate the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq.

> Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law?
>
> Mr. HUMPHREY. Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it.
>
> Mr. RANDOLPH. I am grateful for the reply."

Thus the legislative history of Section 703 of Title VII shows a clear Congressional intent to preserve the Equal Pay Act of 1963 (29 U.S.C. Section 206 (d)). In the leading Equal Pay Act case of *Schultz v. Wheaton Glass Co.*, 421 F. 2d 259 (3d Cir. 1970), Cert. Den. 398 U.S. 905 (1970), the Court held that the Civil Rights Act and the Equal Pay Act are in *pari materia*, and must be read together.

The Tenth Circuit also came to the same conclusion in *Ammons v. Zia Co.*, 448 F. 2d 117 (10th Cir. 1971) in considering a claim of sex discrimination in compensation brought under Title VII. The *Ammons* Court specifically held that Equal Pay Act standards must be used to determine whether a plaintiff has established a prima facie case.

The Wage-Hour Administrator, who is charged with the administration of the Equal Pay Act and whose opinions are entitled to "great deference", implicitly recognizes that actuarial treatment of men and women does not violate the Equal Pay Act (*Hodgson v. Jones*, 453 F.2d 515, 518 (8th Cir. 1971) rehearing den. (1972)). For instance, 29 CFR Section 800.116(d)

(30 F.R. 11504, Sept. 9, 1965, as amended at 31 F.R. 6770, May 6, 1966), provides as follows:

> "(d) *Contributions to employee benefit plans.* If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees." [6(d) refers to the Equal Pay Act.]

This interpretation is also embodied in the Sex Discrimination Guidelines of the Office of Federal Contract Compliance (OFCC) to whom the Secretary of Labor has delegated the responsibility of implementing Executive Order 11246 (as amended, 3 CFR 169). In substance, that Order provides that all Government contracting agencies shall include specific terms in their contracts to provide for nondiscrimination in employment by Government contractors and their subcontractors. Section 60-20.3(c), 41 CFR (1970) states:

> "The employer must not make any distinction based upon sex in employment opportunities, wages, hours, or other conditions of employment. In the area of employer contributions for insurance, pensions, welfare programs and other similar 'fringe benefits' the employer will not be considered

> to have violated these guidelines if his contributions are the same for men and women or if the resulting benefits are equal."

The Wage-Hour Administrator has applied his interpretations consistently. For example, in his opinion letter of August 25, 1970 (CCH Labor Law Reports, ¶30,681), he held, inter alia, that pension contributions are wages within the meaning of the Equal Pay Act and that there is no violation of the Act if the resulting benefits are equal. That opinion reads as follows:

> "This is in further reference to your letter in which you inquired about the application of the equal pay provisions to the amounts an employer contributes toward a retirement or pension plan in behalf of his employees. In our response we said that this matter was under consideration and that we would advise you when a decision had been reached.
>
> After giving the question considerable study in light of the complex issues involved, we have now arrived at a determination that an employer's contributions to a plan providing retirement or pension benefits to his employees will be considered as 'wages' within the meaning of the Equal Pay Act.
>
> We are therefore, taking the position that where the employer's contributions to such a plan are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question may be greater for one sex than for the other. The fact that the employer may make unequal

contributions for employees of opposite sexes in such a situation will not, however, be considered a violation of the Equal Pay Act if the resulting benefits are equal for employees of both sexes where the equal pay standard otherwise applies." (Opinion Letter No. 1117 (WH-70). August 25, 1970).

And he reaffirmed that position in the following opinion of April 26, 1973:

"This is in further reference to your letter of December 13, 1972, concerning the application of the equal pay provisions of the Fair Labor Standards Act.

You state that some members of your association who are employees of nursing schools of universities or colleges are members of retirement plans [that use] different actuarial tables for men and women members. Women members having the same amount of accumulations to their individual accounts as male members of the plan, will upon retirement, get smaller monthly benefits than those received by male members.

Specifically you ask: 'If an employer makes equal contributions to a retirement plan covering male and female employees but if, as a result of separate actuarial tables used by the plan's administrators, the female employees, other things being equal, receive smaller monthly retirement benefits, is the employer in violation of the equal pay provisions?'

In response to your initial question, our opinion letter of August 25, 1970 [W & H Opinion Letter No. 1117], sets forth our current position under

the Equal Pay Act. We are cognizant of the recent amendments to the Civil Rights Act and the Guidelines issued by Equal Employment Opportunity Commission (EEOC) on pension benefits and we will continue to watch developments in this area. However, we do not anticipate any change in our position in the immediate future." (Opinion Letter No. 1276 (W-H 224), April 26, 1973: CCH Labor Law Reports, ¶ 30875).

The interpretations of the Wage-Hour Administrator and that of the Office of Federal Contract Compliance are in harmony with the Congressional intent in preserving the actuarial treatment of men and women. (See the Humphrey-Randolph colloquy, *supra,* 110 Cong. Rec. 13663-64, June 12, 1964). Moreover, such interpretations are consistent with the basic "equal pay" principle embodied in the legislation, the principle that overall compensation (both payments made directly to and on behalf of male and female employees) should be the same. This of course makes it appropriate to consider that demonstrated differences in pension costs for men and women constitute "a factor other than sex" which would justify differential treatment under the Equal Pay Act.

The Wage-Hour Administrator very early recognized the directive of Congress to consider such costs. The Administrator quoted from the Senate Report, and declared:

"It appeared to be the intent of Congress that the question of cost factors, as they relate to the application of the equal pay provisions of the Fair Labor Standards Act, should be taken into consideration when a determination is made

as to what constitutes a justifiable wage differential between employees of the opposite sex who are performing equal work within the meaning of the statute." (BNA Wage & Hour Man. 95: 607.)

The legislative history of Section 703(h) (42 U.S.C. 2000e-2(h)), clearly reveals the Congressional intent to require the Equal Opportunity Employment Commission to adopt the relevant opinions of the Wage and Hour Administrator in making interpretations under Title VII (See Wage-Hour opinion, WH-140, July 1, 1971, BNA Wage & Hour Man. 95:657).

Indeed, the EEOC has expressly honored this Congressional intent in its Guidelines (See 30 F.R. 14926, 14928, Dec. 2, 1965); Section 1604.7, provided in relevant part as follows:

"§ 1604.7 Relationship of Title VII to the Equal Pay Act.

(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703 (h) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII.

. . . .

(b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, Part 800.119-800.163. Relevant opinions of the Administrator interpreting 'the equal pay for equal work standard' will also be adopted by the Commission."

Moreover, EEOC decisions have applied the Equal Pay standards and have indicated that employers could rely on Wage and Hour interpretations on equal pay issues (Decision No. 71-1462, CCH, EEOC. Dec. ¶6219 n.1 (3-1-71)).

For nearly six and one half years, the EEOC followed the Wage-Hour Administrator's interpretations until April 1972, when it declared that it will no longer be bound by the Wage and Hour Administrator's interpretations. (29 CFR Section 1604.8 (1972)). It then revised its Guidelines to state that:

"It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex." (29 CFR Section 1604.9(f) (1972)).

Its interpretation (No. 74-118, upon which plaintiffs place heavy reliance) followed two years later (April 26, 1974) which stated that the use of mortality tables for men and women to determine retirement benefits were in violation of Title VII.

This change in position thus creates a current conflict between the EEOC on the one hand and the Wage-Hour Administrator and also the Office of Federal Contract Compliance on the other hand.

The EEOC's present Guidelines on pensions not only disregard the spirit and substance of the Equal Pay Act, but also confound notions of fairness and logic. As interpreted by the EEOC staff, its Guidelines require equal contributions as well as equal periodic pension payments for male and female employees of the same age and credits. Since women have a significantly longer life expectancy than men, this interpretation would force employers to contribute even more for their female employees than their male employees in order to provide the same contribution rates and the same monthly payments. Over the course of her remaining life, the average female annuitant would receive substantially more money than her male counterpart under such a requirement. The use of actuarial tables based on age and sex avoids such inequities between groups of annuitants.

Thus the recognition of female longevity as a factor affecting life expectancy in the establishment of contribution rates is an equitable practice, totally unlike the common group presumptions or sex-stereotypes which have been condemned as a basis for employment decisions. Women have often been disadvantaged by assumptions that certain characteristics are shared by all women. (See e.g., *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1972)).

For example, an employer may refuse to consider women for a position requiring the lifting of more than 30 pounds on the premise that women cannot lift such weight. Such a policy suffers from two logical defects: the premise itself, (1) may be based on misinformation or on notions of paternalism; and (2) is unnecessary, since the ability or trait can be individual-

ly ascertained by testing. By contrast, unquestionably reliable data establishes the fact of greater female life expectancy. Moreover, there is no alternative which would permit individual testing.

It is equally important to recognize that the alternative to grouping by sex suggested by the EEOC Guidelines is not individual testing. If the sex of annuitants must be ignored in determining benefit levels, insurers will be forced to make another assumption about a group of people, *i.e.*, men and women of the same age have equal life expectancies, which is demonstrably erroneous.

Although the use of sex-based actuarial tables has been recognized and approved by the courts, it has been suggested that pension plans should "average things out" by adopting a unisex table which ignores life expectancy differences based on sex. Ignoring the difference will not make it go away; male annuitants under such a plan would be required to subsidize the benefits of female annuitants.

II

EEOC'S INTERPRETATIONS ARE NOT BINDING, NOR ARE THEY ENTITLED TO DEFERENCE WHERE THEY ARE WRONG OR LACK CONSISTENCY

EEOC's recent change in position is not supported by legislative history—in fact it flies directly in the face of Congressional intent. Nor is it supported by judicial decisions. Its Guidelines on sex discrimination were implicitly rejected in *Geduldig v. Aiello*, ... U.S. ....., 41 L.Ed.2d 256, 94 S. Ct. 2485 (1974). The Supreme Court rendered its opinion after EEOC had announced its decision No. 74-118 (April 26,

1974). We shall address ourselves to *Geduldig v. Aiello* in further detail later on in this memorandum.

However, *Geduldig v. Aiello, supra,* was not the first instance where the Supreme Court has refused to defer the EEOC guidelines on sex discrimination. In fact, Justice Marshall, in his concurring opinion in *Phillips v. Martin Marietta,* 400 U.S. 542, 545, 27 L.Ed.2d 613, 616, 91 S Ct. 496 (1971) comments upon such refusal.

This Court is not bound by EEOC guidelines or its decisions. Title VII (42 U.S.C. 2000e *et seq.*) makes it quite clear that the EEOC does not have direct powers of enforcement. Congress withheld those powers in 1964 from the Commission and again in 1972 when it amended that Title. The Commission cannot adjudicate claims or impose administrative sanctions. The final responsibility for enforcement of Title VII is vested with federal courts *(Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 41, 39 L.Ed. 2d 147).

The Supreme Court in *Griggs v. Duke Power Co.,* 401 U.S. 424, 28 L.Ed. 2d 158, 91 S Ct. 849 (1971) has given deference to the EEOC's interpretation. But there the Court explicitly found that the interpretation was fully supported by legislative history.

On the other hand, in the recent case of *Espinoza v. Farah Mfg. Co.,* 414 U.S. 86, 38 L.Ed. 2d 287, 94 S Ct. 334 (1973), the Supreme Court specifically stated that "Courts need not defer to an administrative construction of a statute where there are compelling indications that it is wrong." (*Espinoza, supra* at 94, 95). In that case, plaintiff, a resident alien, contended that the defendant employer violated Title VII by refusing to employ her because of her alien status. The Court said "The statute's legislative history, though

quite meager" fully supported the construction that Section 703 of Title VII was not intended to include defendant's employment practice of not hiring aliens. In rejecting the EEOC's guideline, the Court noted that the Commission itself once held a different view than that stated in its current guidelines. It said that deference should not be given to the Commission's changed interpretation where it would be inconsistent with an obvious Congressional intent.

As we have pointed out above, the legislative history of Title VII, with particular reference to Section 703, demonstrates a Congressional intent that insurance concepts of actuarial treatment continue on under Title VII (e.g., colloquy between Senators Humphrey and Randolph, *supra,* 110 Cong. Rec. 13663-64 and also the Bennett amendment colloquies, 110 Cong. Rec. 13647). In short, EEOC's new interpretation is inconsistent with an obvious Congressional intent. And it is also in conflict with the Wage-Hour Administrator who has consistently held that a system such as Defendant's is not in violation of the Equal Pay Act, an interpretation followed by the EEOC itself for nearly six and one-half years.

III

INDEPENDENT OF CONTRARY CONGRESSIONAL INTENT, THE SUPREME COURT'S RECENT DECISION IN *GEDULDIG v. AIELLO* CASTS SERIOUS DOUBTS ON THE VALIDITY OF EEOC'S GUIDELINES ON SEX DISCRIMINATION

Aside from Congressional intent to the contrary, EEOC's recent guideline change is suspect in light of the Supreme Court decision in *Geduldig v. Aiello,*

..... U.S. ....., 41 L.Ed. 2d 256, 94 S. Ct. 2485 (1974). In that case plaintiffs, who were women, contended that the exclusion of normal pregnancy from coverage of the California disability insurance system was an invidious discrimination based on sex and hence unconstitutional. A three-judge court (Northern District of California) agreed with that contention. The Supreme Court disagreed with the lower court and reversed.

The Court (at 41 L.Ed. 2d 262) noted that California's disability benefit system was established as an insurance program that was to function essentially in accordance with insurance concepts. It held (at 41 L.Ed. 2d 264) that the State of California had a legitimate interest in "maintaining the self-supporting nature of its insurance program" and that it also had a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees.

The Court went on to say (41 L.Ed. 2d at 264-65, n.20):

". . . .

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra.* Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation

> such as this on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."

The EEOC appeared as amicus curiae in the case and argued that pregnancy is a condition peculiar to women, and therefore California's exclusion of women from disability benefits for normal pregnancy is discrimination because of sex. Justice Brennan in his dissenting opinion noted that conclusion by the EEOC (41 L.Ed. 2d 267). He cited the Commission's Guidelines (41 L.Ed. 2d 267-68) which declared that practices such as California's were, in effect, unlawful sex discrimination. (29 CFR Section 1604.10(b) (1973)). He also cited another section of EEOC's Guidelines which the Supreme Court implicitly rejected. That section provides as follows (41 L.Ed. 2d at 269, n.9):

> "It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." 29 CFR § 1604.9(e).

The above quoted section was one of the bases for EEOC's decision No. 74-118. It will be recalled in that opinion, EEOC found the use of separate actuarial tables for men and women in pension systems violative of Title VII.

Thus the Supreme Court in *Geduldig, supra* effectively holds that actuarial considerations are permissible in designing an employee benefit system for men and women.

The standard for determining what is unlawful sex discrimination in *Geduldig,* although that case involved the Fourteenth Amendment, is applicable to Title VII cases. For example, the District Court, Southern District of New York, in *Communications Workers of America, et al. v. American Telephone and Telegraph Co., et al.,* 8 EPD, CCH Labor Law Reports, ¶ 9615 (August 2, 1974), applied the *Geduldig v. Aiello* standards to a Title VII case where the fact pattern was similar to that in *Geduldig*. The Court stated that:

> "The holding was that California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). Such a holding precludes relief under Title VII even more clearly than under the Fourteenth Amendment. Under the Amendment it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII, which deals only with discrimination 'because of . . . sex.' 42 U.S.C. §2000e (2) (a)(1)."

The Court, *sua sponte,* dismissed plaintiffs' complaint and certified to the Court of Appeals pursuant to 28 U.S.C. § 1292 (b).

Furthermore, it is interesting to compare *Gruenwald v. Gardner,* 390 F.2d 591 (2d Cir. 1968), Cert. Den. 393 U.S. 982 (1968) in light of *Geduldig v. Aiello, supra,* and *Communications Workers of America, supra.*

In *Gruenwald,* the plaintiff, a man, was awarded Social Security Act benefits which were less than a woman would have received at the same age. He contended that there was an unequal treatment based solely on sex and that the special treatment for women was invidious discrimination. The Court disposed of that contention by saying (at 592-93):

> ". . . the trend of authority makes it clear that the variation in the amounts of retirement benefits based upon differences of men and women is constitutionally valid. The appellant does not press his argument that the section in question is violative of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1964), but we find that contention is also without merit."

IV
THE STATUS QUO SHOULD BE PRESERVED

A. DEFENDANTS AND PLAINTIFFS WILL SUFFER GREATER HARM IF THE PRELIMINARY INJUNCTION IS GRANTED

We need not elaborate on the obvious, but as the affidavits of both Harry M. Church and Allan F. Larson show, the actuarial soundness of the Department's Retirement Plan would be affected by the granting of the requested injunction. The Plan was carefully designed, and to simply reduce women's contributions without making other compensating changes would have an immediate adverse impact on the Department's Plan. Although the request for equalization appears simple in form, it overlooks the many complicated consequences that need to be fully considered.

Moreover, if the injunction requested by plaintiffs is granted, the Plan will not be properly funded, and defendants by maintaining the same would immediately be in violation of Los Angeles City Charter Section 220.1(1)(a). That Section mandates the Department to maintain the Plan in accordance with sound business practices and recognized actuarial methods.

What would be the effect of granting the preliminary injunction insofar as the class members themselves are concerned?

If the defendants were to prevail after protracted litigation, thousands of class members could be required to refund to the defendants sums which might amount to several hundred dollars apiece. The recovery thereof would create far greater hardships than preserving the status quo and could well lead to labor strife and irreparable damage to the excellent employee-employer relationship preserved at the Department of Water and Power to date.

The harm that defendants as well as individual members of the Plan will suffer if the injunction is granted is of no small consequence and even becomes more significant when compared with the alleged injuries suffered by plaintiffs Carolyn Mayshack and Alice F. Muller.

Plaintiffs rely upon the affidavits of Carolyn Mayshack and Alice F. Muller to show that they will suffer irreparable injury if a preliminary injunction is not granted. However, there is no showing that these two persons are typical of all other plaintiffs in the class or that other class members even concur in the sought-for preliminary injunction if there is a prospect that they will have to make up the difference in contributions, with interest, at a later date.

In Carolyn Mayshack's situation, the facts stated in plaintiffs' memorandum erroneously state (page 42) that her counterpart pays $9.50 a month less than she pays. However, of the $57.23 a month that Ms. Mayshack pays to the Plan, $47.58 is contributed to the Retirement fund. The balance is paid to the Death and Disability funds. Her male counterpart pays $41.44 a month to the Retirement fund or $6.14 a month less. The male counterpart's contribution to the Death and Disability funds are exactly the same as Ms. Mayshack's. (Affidavit of Allan F. Larson). In addition, her affidavit understates her monthly take-home pay. (See affidavit of Allan F. Larson).

Alice F. Muller's emotional reaction to the Plan's design appears to be one that is strictly personal and cannot be said to be typical of all others. She has neglected to mention that she has been a member of defendant Board of Administration. During her period of service on that Board she knew or she should have known of the actuarial bases for the Plan and of the fact—which plaintiffs concede—that women live longer than men. Her letter of resignation from that Board (See affidavit of Allan F. Larson) certainly gave no hint of any disagreement in the actuarial treatment of men and women. Further, it appears that she was complimentary in that she refers to the Plan as "well-administered", and the Board as "earnest, knowledgeable and progressive."

Ms. Muller's attempt to render an actuarially equal plan to an actuarially unequal plan would discriminate against male employees. In connection with this prospect, we invite the Court's attention to the fact that the ENGINEERS AND ARCHITECTS ASSOCIATION has filed a charge with EEOC on behalf of

men charging that women are presently getting greater benefits than men. (Exhibit A)

B. THE PUBLIC INTEREST WILL NOT BE SERVED BY THE GRANTING OF A PRELIMINARY INJUNCTION

The public interest will not be served by the Court's granting a preliminary injunction which would have the effect of making the Department's Plan unsound, since the importance of an employer's maintaining a sound pension system is indisputable.

Moreover, the granting of an injunction would have an impact on other public retirement systems—a factor that should not pass unnoticed by this Court. Every other public retirement system of which we are aware utilizes separate mortality tables in operating their systems (affidavit of Harry M. Church.)

Undoubtedly, there are many private pension plans that are similarly designed. A preliminary order to stop withholding contributions in varying amounts would provide a precedent for further similar orders and a final judgment to the contrary could lead to a multiplicity of lawsuits for back contributions. The injunction would spill beyond the boundaries of this case and send giant ripples throughout the country.

Nor does the public interest require, as plaintiffs suggest, that defendants refine their mortality tables by further subdivision of classes, i.e., smokers and non-smokers. As Justice Douglas pointed out in his opinion for the Supreme Court in *Kahn v. Shevin*, ... U.S. ....., 40 L.Ed. 2d 189, 94 S Ct. 534 (1974), the controlling test is whether the classification is legally permissible and not whether it is perfect. As we have

shown above, the Congressional intent is to permit the continuation of the use of actuarial tables based on objective factors.

CONCLUSION

For the foregoing reasons, defendants urge the Court to deny plaintiffs' motion for a preliminary injunction.

DATED: October 11, 1974.

Respectfully submitted,

BURT PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power
MADELEINE I. FLIER, Deputy City Attorney
GILBERT W. LEE, Deputy City Attorney

By /s/ Madeleine I. Flier
MADELEINE I. FLIER
Deputy City Attorney

111 No. Hope Street
P.O. Box 111
Los Angeles, California 90051

Attorneys for Defendants

EXHIBIT A.

Return Address: Equal Employment Opportunity Commission, 1543 W. Olympic Blvd., Suite 340, Los Angeles, California 90015.

Important: See Notice of Non-Retaliation on Reverse.

Mailing Address: Chief Executive Officer, Department of Water & Power, 111 N. Hope Street, Los Angeles, California 90012.

Future Correspondence Will Refer to Charge No.: TLA3 0184.

Date of Violation: 07/72.

Place of Violation: Same as Addressee.

NOTICE OF CHARGE OF
EMPLOYMENT DISCRIMINATION

You are hereby notified that a charge of employment discrimination under Sec. 706 of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-5, as amended, has been filed against you. Information relating to the date, place, and circumstances of the alleged unlawful employment practice or practices is provided herein. The Act does not contemplate that the name of the person bringing the charge be made available to you until the charge is served.

No action on your part is necessary at this time. However, if you wish to submit any information in writing, it will be made a part of the file and will be considered at the time we investigate this charge. Telephone communications cannot be made a part of the record. Section 1602.14 of the Commission's Regulations requires the preservation of all relevant personnel records until this charge is resolved.

We will investigate this charge as soon as possible. However, our heavy backlog of pending work makes it impossible to predict when we will contact you again. We hope that you will hold any questions about this specific complaint in abeyance until we are able to begin the investigation.

Basis of Discrimination: Race or Color, No; Sex, Yes; Religion, No.; National Origin, No.

Nature of Charge: Benefits. [Other items not checked omitted in printing.]

Date: Nov. 15, 1972.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
1543 West Olympic Boulevard, Suite 340
LOS ANGELES, CALIFORNIA 90015

IN REPLY REFER TO:
RECEIPT FOR SERVICE OF CHARGE
CASE NUMBER: TLA3 0184

Engineers & Architects vs. L. A. Dept. of Water & Power Association

This document certifies service of a copy of the one attached charge alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

Served by Wendell Wilson, Equal Opportunity Specialist of the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, to

Mr. Irvin E. Remy
Industrial Relations Administrator
Department of Water & Power
111 N. Hope Street
Room 555
Los Angeles, California

RECEIPT ACKNOWLEDGED BY:

/s/ Irvin E. Remy
Signature
/s/ Industrial Relations Administrator
Title
December 8, 1972
Date

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Reginal Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE).

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

1. Your Name: Engineers and Architects Association, Civic Center Chapter; Phone Number 624-9317; Street Address: 417 South Hill Street, Room 756; City: Los Angeles; State: California; Zip Code: 90013.

2. Was the Discrimination Because of: (Please Check one) Race or Color, No; Religious Creed, No; National Origin, No; Sex, Yes.

3. Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all. Name: Department of Water and Power of the City of Los Angeles; Street address: 111 North Hope Street; City: Los Angeles; State: California; Zip Code: 90012. AND (other parties if any) Board of Water and Power Commissioners, Board of Administration and the Administrator-Secretary of the Department of Water and Power Retirement, Disability and Death Benefit Plan.

4. Have you filed this charge with a state or local government agency? Yes.

5. If your charge is against a company or a union, how many employees or members?

6. The most recent date on which this discrimination took place: Month: July; Day: .....; Year: 1972.

7. Explain what unfair thing was done to you. How were other persons treated differently? Please see attached statement.

8. I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date: July 31, 1972.

Subscribed and sworn to before me this 31st day of July, 1972.

/s/ Sandra E. Abrahamian

No. 7

The charged parties have the responsibility, in various measure, for administration of the Retirement, Disability and Death Benefit Plan of the Department. The Plan as structured and administered, discriminates against male employees in that it requires unequal contribution rates during the term of active employment and because, notwithstanding the fact that it has collected greater contributions from male employees during the term of active employment, it pays greater pension benefits to female employees of like standing.

United States District Court, Central District of California.

Affidavit of Harry M. Church.

[Title Omitted in Printing]

State of California, County of Los Angeles—ss:

HARRY M. CHURCH, being duly sworn, deposes and says:

I am a partner in the firm of Coates and Crawford, Consulting Actuaries; I have continuously engaged in the actuarial consulting practice since 1952; I am an Associate of the Casualty Actuarial Society; Associate of the Society of Actuaries; Member of the American Academy of Actuaries; and Member of the Western Pension Conference; I am the consulting actuary for the Department of Water and Power Retirement Plan and have been since February 1, 1957; I also serve as consulting actuary to numerous other public retirement systems.

In my professional opinion, women live longer and have a greater life expectancy than men. The bases for my opinion are the following:

(1) I have personally conducted numerous statistical studies of male and female mortality including a number of studies conducted on Department of Water and Power employees—most recent of which was as of June 30, 1972. Each study involves a scientific determination of the probability of mortality of a determined group of individuals.

(2) Our firm has conducted numerous other mortality studies over a period of many years and I am cognizant of mortality studies conducted by others throughout the nation. Mortality tables for annuity

and pension purposes are established from and in accordance with such professionally conducted studies of mortality. All studies and mortality tables of which I am aware reflect the fact that women live longer than men.

(3) Every public retirement system in the State of California of which I am aware reflects the difference in mortality between men and women.

Sound actuarial practice requires that annuity or pension plans be based on averaging of life expectancies of persons in ascertained classes (usually age and sex) since the life expectancy of a specific person cannot be predetermined.

The Department of Water and Power Retirement Plan is designed to provide that female employees pay an equal proportion of the total cost of their benefits as male employees pay for theirs. The Plan is also designed to pay the same benefits per month to men and women; but because the life expectancy of women is longer, the total payout to women is greater. Because female employees of the Department live longer than male employees and the total payout to females is greater, it necessarily follows that female contribution rates must be higher than male contribution rates. However, if a man and woman each make equal monthly contributions during their working lives, then the return to each during their retired lives (i.e., the total of their respective pension allowances) will be substantially equal, with women receiving somewhat greater benefits.

In addition, the Plan provides four optional benefit programs which the employee may elect upon retirement. All four of these options provide both a greater

monthly as well as total benefit to women than they provide to men.

With respect to surviving eligible spouse benefits that are available to both male and female employees, Department employees do not contribute for such benefits.

As a result of my most recent (1972) mortality study, the Board of Administration of the Retirement Plan adopted the 1951 Group Annuity Mortality Table. This table is published in the Transactions of the Society of Actuaries and is used extensively by both public and private retirement systems to reflect the mortality of retired lives. Consistent with other pension and annuity tables, this table provides separate tables for men and women.

Contribution rates of Department women are 14.84% higher than the contribution rates of men under the Retirement Plan. This factor was calculated by us and reflects the relationship between the life annuity values at age 65 for men and women based upon the 1951 group annuity mortality table.

If the female contribution rates to the Retirement Plan are reduced to the male contribution rate level and no additional changes are made, then the retirement plan will not be properly funded, i.e., assets on hand plus future contributions made to the Fund will not be adequate to provide the benefits that have been promised. In other words, the total actuarial liabilities of the Plan will exceed the total actuarial assets.

/s/ Harry M. Church
HARRY M. CHURCH

Subscribed and sworn to before me this 1st day of October, 1974.

/s/ Inez P. Egan
Notary Public in and for the County of
Los Angeles, State of California

[Seal]

United States District Court, Central District of California.

Affidavit of Allan F. Larson.

[Title Omitted in Printing]

State of California, County of Los Angeles—ss:

ALLAN F. LARSON, being duly sworn, deposes and says:

I am the Administrator-Secretary for the Board of Administration of the Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan; I am the custodian of all the records of the Plan; I have served as the Administrator-Secretary since June 1970, and for the five preceding years I served as the Assistant Administrator-Secretary; I have been an employee of the Department of Water and Power for more than 38 years.

A woman employee pays into the Retirement Fund approximately 14.84% more than a man entering the Retirement Plan at the same age. In addition to other Department payments to the Retirement Fund, the Department pays each month at the rate of 110% of the employee payments. For example, if a man contributes $1.00, the Department contributes $1.10 for his account. A woman who entered the Retirement Plan at the same age as the man would contribute $1.15 and the Department would contribute $1.26 for her account.

The preceding contribution ratios are necessary to satisfy the following basic design concepts of the Plan:

1. Women's monthly retirement allowances should equal those provided men with the same age at employment and retirement and with the same Department service and salary history.

2. Women should contribute to the Retirement Fund the same proportion of the total moneys as contributed by men, required to pay their respective retirement allowances for their respective expected lives at retirement. As women live longer, they should contribute on a higher basis.

Periodic actuarial studies of the deaths of former employees receiving monthly service retirement pensions consistently disclose that Department women outlive Department men, and that this difference in average life expectancy is widening.

Based upon the general actuarial survey and evaluation of the Retirement Plan most recently completed on June 30, 1972, the Board of Administration adopted the "1951 Group Annuity Table" published in the transactions of the Society of Actuaries. This table has been adopted for Plan use in determining the total moneys which must be set aside for lifetime retirement allowances of employees upon their retirement. The table was adopted because it, better than other mortality tables, would have predicted the deaths of persons receiving service retirement pensions from the Plan.

To require that women contribute at the same rates as men and still provide that women receive the same monthly retirement allowance as men with no other changes to the Retirement Plan will result in improper funding of the Retirement Plan; that is, assets on hand plus future contributions made to the fund will not be adequate to provide the benefits that have been promised.

If the Department's monthly contributions to the Retirement Fund were increased by an amount equal to the difference between male and female present contribution rates, the Department's expected total retirement compensation for women retiring at age 65 (under formula retirement pensions) would be at least 17.5% greater than for men retiring at age 65. This difference is exclusive of cost of living adjustments which currently provide additional compensation to retirees. Since Department women live longer than Department men, they receive cost of living adjustments over a longer period than men. If 3% cost of living adjustments are granted each year, the Department's expected total contributions would be 30% greater for women than for men.

Alice F. Muller was appointed to the Board of Administration of the Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan and attended her first meeting on January 25, 1968. She was then elected to serve a three-year term starting October 13, 1968. Ms. Muller filed a letter of resignation with the Board on December 19, 1968 (a copy of that letter is attached hereto).

Carolyn Mayshack's annual salary, based on 2088 hours a year, is $11,784. On an hourly basis, this is equivalent to $5.644 per hour. Her monthly salary, based on 174 hours, is $982. Ms. Mayshack is paid every two weeks or for an 80-hour work period. For a four-week period, or 160 hours, she would gross $903.04.

Federal and state income taxes are withheld from Ms. Mayshack on the basis of her being married and claiming one exemption (herself). The federal income

tax withheld for each two-week pay period is $67.13; the state income tax withheld is $7.49. If Ms. Mayshack were to claim an exemption for herself and two dependents, the amount of income taxes withheld would be $55.20 and $4.80 for federal and state respectively.

Contributions to the Retirement, Death and Disability Funds are deducted from twelve of the twenty-six biweekly pay period checks per year. For Ms. Mayshack, a total of $57.23 a month is deducted. Of this amount $6.14 is contributed to the Disability Fund; $3.51 is contributed to the Death Benefit Fund, and $47.58 is contributed to the Retirement Fund. Her male counterpart would pay $41.44, or $6.14 less than Ms. Mayshack, to the Retirement Fund, and he would pay identical amounts as Ms. Mayshack to the other two funds.

Ms. Mayshack's "take-home pay" after withholding for federal and state income taxes and contributions to the three funds averages $704.39 for a four-week period (160 hours) and is $762.41 for a monthly period (174 hours). If Ms. Mayshack were to claim two additional exemptions for her dependents, her take-home pay would be $733.63 for a four-week period and $794.27 for a monthly period.

/s/ Allan F. Larson
ALLAN F. LARSON

Subscribed and sworn to before me this 11th day of October 1974.

/s/ Sylvia F. Hoffman
Notary Public in and for the County
of Los Angeles, State of California

[Seal]

December 17, 1968

The Board of Administration
Water and Power Employees
Retirement Plan
Building

Gentlemen:

With regret I tender my resignation as a member of the Board of Administration of the Retirement Plan, effective immediately. I have been appointed to a new position in the Power System, and will be unable to continue as a Board member.

Though I have long dreamed of working on a power construction project, my appointment to such a job seemed outside the realm of possibility, even as recently as the Retirement Board election. I apologize for the break in continuity my resignation is causing, but I feel that I must give all my energy and attention to my new job—and it is only fair that the employees in the Joint Group be represented by one of their own.

It has been a pleasure and a valuable experience to serve on the Board, and I shall miss it, and each of you, more than you can imagine. I leave you, knowing that our Retirement Plan is well-administered, and that by bright and not-too-distant future as a retired employee is in the hands of a Board that is earnest, knowledgeable, and progressive.

Sadly,
/s/ Alice Muller

Mr. Benson moved that Miss Muller's resignation be accepted with regret. Mr. Nystrom seconded the motion.

Ayes: Members: Benson, Luhring, Nystrom, Kanouse, Sachau, Mullin

Noes: None

-Letter attachment
LARSON Affidavit-

[Affidavit of Service Omitted in Printing]

United States District Court, Central District of California.

Memorandum and Order Granting Plaintiffs' Motion for Preliminary Injunction.

Marie Manhart, et al., Plaintiffs, v. City of Los Angeles, Department of Water and Power, et al., Defendants. Civil No. 73-2272-HP.

Filed: Jan. 15, 1975.

Printed as Appendix B to the Petition for Writ of Certiorari.

United States District Court, Central District of California.

Preliminary Injunction.

Marie Manhart, et al., Plaintiffs, v. City of Los Angeles, Department of Water and Power, et al., Defendants. Civil No. 73-2272-HP.

Filed: Jan. 15, 1975.

This matter having come on for hearing on plaintiffs' motion, made pursuant to Rule 65, F.R.Civ.P., for a preliminary injunction, and the court having this day filed its Memorandum and Order (which constitute the court's findings of fact and conclusions of law, as authorized by Rule 52, F.R.Civ.P.) which grants plaintiffs' motion;

IT IS ORDERED that:

1. Defendants are enjoined from requiring individual female employees to make larger contributions than individual male employees to the Department of Water and Power Employees' Retirement, Disability, and Death Benefit Insurance Plan.

2. This Preliminary Injunction shall remain in effect until further order of this court.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Preliminary Injunction, by United States mail, upon the attorneys of record for the parties herein.

Dated: January 15, 1975.

/s/ Harry Pregerson
Harry Pregerson
United States District Judge

United States District Court, Central District of California.

Motion for Summary Judgment.

[Title Omitted in Printing]

Filed: Apr. 10, 1975.

The plaintiffs move the Court as follows:

1. That it enter, upon the grounds that there is no genuine issue as to any material fact and the plaintiffs are entitled to a judgment as a matter of law, and pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, the following summary judgment in the plaintiffs' favor:

That the practice of the Department of Water and Power of the City of Los Angeles of requiring females to make larger monthly contributions to the Department of Water and Power Employees' Retirement, Disability, and Death Benefit Insurance Plan than their counterpart males was an unlawful employment practice within the meaning of Section 701(a)(1) of the Equal Employment Opportunity Act of 1972;

That the defendants are permanently enjoined from requiring individual female employees to make larger contributions than individual male employees to the Department of Water and Power Employees' Retirement, Disability, and Death Benefit Insurance Plan;

That (a) all female employees presently working for the Department of Water and Power who are members of the Retirement Plan, (b) all female members of the Plan who retired from the active service of the Department of Water and Power on or after March 24, 1972, and (c) all females who resigned from the active service of the Department of Water

and Power on or after March 24, 1972, who left contributions to the Water and Power Retirement Fund on deposit, shall be refunded all of their contributions made on and after March 24, 1972 which exceed the contributions their male counterparts would have made on and after March 24, 1972, plus interest at seven percent (7%) running from the date of contribution;

That the defendants pay counsel for the plaintiffs reasonable attorneys' fees; and

That the defendants reimburse the plaintiffs for the costs of this action; or, in the alternative,

2. That the Court enter, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, a summary judgment in the plaintiffs' favor on the issue of liability alone, the issue of relief to be decided by the Court after an appropriate hearing thereon, upon the grounds that there is no genuine issue as to any material fact with respect to the issue of liability and that the plaintiffs are entitled to summary judgment on the issue of liability.

This motion is based upon the Statement of Reasons and Memorandum of Points and Authorities filed by the plaintiffs in Support of their Motion for Preliminary Injunction, the Affidavits which accompanied the Statement of Reasons, the plaintiffs' Reply Memorandum in Support of their Motion for Preliminary Injunction, the plaintiffs' Additional Points and Authorities in Support of their Motion for Preliminary Injunction, and the Statement of Reasons and Memorandum of Points and Authorities in Support of Summary Judgment which accompany this Motion.

DATED: April 8, 1975.

KATHERINE STOLL BURNS
ROBERT M. DOHRMANN
MICHAEL EVAN GOLD
Schwartz, Steinsapir & Dohrmann

/s/ By M. Gold
MICHAEL EVAN GOLD
Attorneys for Plaintiffs

United States District Court, Central District of California.

Objections to Proposed Findings of Fact and Conclusions of Law; Additional Proposed Findings.

Marie Manhart, et al., Plaintiffs, vs. City of Los Angeles, Department of Water and Power, et al., Defendants. Civil Action No. 73-2272-HP.

In the event the Court grants plaintiffs' Motion for Summary Judgment defendants have the following objections to the proposed findings of fact and conclusions of law.

Proposed Objections to Findings of Fact

First Finding of Fact:

Defendants object to this finding on the grounds that:

1. There is no evidence that any of the plaintiffs or the Committee to Protect Women's Retirement Benefits have standing to represent the class of employees who have resigned and left contributions on deposit with the Plan.

2. There is no evidence that the Committee to Protect Women's Retirement Benefits has any separate standing to represent employees since the membership of such ad hoc organization has not been established yet.

Third Finding of Fact:

Defendants object to this finding on the grounds that it is incomplete. Defendants propose the second sentence be amended to read:

> "The Plan is funded by compulsory employee contributions matched 110% by compulsory employer contributions, and earnings thereon."

[Affidavit of Allan F. Larson, Exhibit A, p. 33 to Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction.]

Fourth Finding of Fact:

Defendants object to this finding on the grounds that it misstates the facts. Where females as a class outlived their male counterparts, the Plan paid substantially more benefits to them. Defendants submit the Finding should read:

> "Between March 24, 1972 and December 31, 1974, the Plan paid the same monthly benefits to male and female retirants of the same age and length of service. However, slightly higher contributions were required of female employees than males because they live longer and would collect monthly payments for a longer period of time."

[Supplemental affidavit of Allan F. Larson to Statement of Genuine Issues and Points and Authorities in Opposition to Motion for Summary Judgment.]

Fifth Finding of Fact:

We request that the Fifth Finding of Fact be supplemented by adding:

> "The union, IBEW Local 18, did not exhaust state remedies by filing any claim of discrimination with the State Fair Employment Practices Commission or any other state agency. The State would not take deferral of the action from the EEOC on the grounds that it had no jurisdiction in the matter. [Affidavit of Barbara Miller to Memorandum of Points and Authorities in Opposition to Motion to Dismiss.] None of the other named

> plaintiffs, apart from IBEW Local 18, filed charges with any public agency, federal or state."

We request the following additional Findings of Fact:

Seventh Finding of Fact:

> "Women as a class outlive men; and Department of Water and Power female employees and retired employees outlive their male counterparts."

[Affidavit of Allan F. Larson and Harry M. Church in Support of Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction.]

Eighth Finding of Fact:

> "There was no Congressional intent in adopting the Civil Rights Act of 1964, and more specifically, Title VII thereof, to allow the continuance of the practice of computing benefits in public retirement plans based on separate male and female mortality and life expectancy tables."

Proposed Objections to Conclusions of Law

Conclusion No. 2:

Defendants submit that this Conclusion should reflect the fact that there was no deferral to the state agency as required by the regulations relative to Title VII [Title 29 C.F.R. §1601.12], whether because the state agency refused to take deferral or plaintiffs failed to apply to that agency for relief on their own.

Conclusion No. 6:

Defendants object to this Conclusion on the grounds that defendants' Plan is that of a public agency and defendant Department of Water and Power is a public employer. We submit that an award of money damages

and interest thereon, against an agency of the state is in violation of the Eleventh Amendment to the United States Constitution. [*Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974); *Fitzpatrick v. Bitzer,* 8 EPD, par. 9685, p. 5878 (1974).]

It is significant that none of the cases cited by plaintiffs for the authority to receive monetary awards of back pay, or back pay and interest, involve a public agency.

Even though plaintiffs characterize this requested award as restitution, if the money is withdrawn from the Retirement Fund in which it was deposited, it will be necessary to replace it to maintain a financially sound retirement system. That replacement will have to be at the expense of the contributors or the Department of Water and Power, which means ultimately the general public.

Dated: May 15, 1975.

BURT PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant
City Attorney for Water and Power

/s/ By David J. Oliphant
DAVID J. OLIPHANT
Deputy City Attorney

[Proof of Service Omitted in Printing]

United States District Court, Central District of California.

Statement of Genuine Issues and Points and Authorities in Opposition to Motion for Summary Judgment.

Affidavits of Harry M. Church and Allan F. Larson; and Their Supplemental Affidavits.

Marie Manhart, et al., Plaintiffs, vs. City of Los Angeles, Department of Water and Power, et al., Defendants. Civil Action No. 73-2272-HP.

Filed: May 15, 1975.

Introductory Statement

Having obtained a preliminary injunction herein, plaintiffs now seek summary judgment on the grounds that no genuine issues of fact remain to be tried. Such is not the case, and defendants must oppose the granting of summary judgment or lose the opportunity to make a full and fair record of their case.

Plaintiffs seek back pay from March 24, 1972. It is their position that since the injunction has been granted, liability is determined and all that remains is the appointment of a Master to figure out what the Department must pay plaintiffs. However, defendants take the position that none of the women covered by this action have in fact lost anything as a result of paying a higher contribution rate. We believe that the requirement of higher contributions was perfectly in keeping with Title VII of the Civil Rights Act, and to return moneys to plaintiffs would give them a windfall of funds to which they are not entitled since they paid contributions measured by the value of their benefits, as did their male counterparts.

In order to fully protect defendants' rights in this lawsuit, it is absolutely necessary that they be permitted to put in evidence the complete proof of the actuarial bases for their retirement plan (hereinafter "Plan").

When the Court granted the Motion for Preliminary Injunction, the Plan had already equalized contribution rates, making the issuance of the injunction moot (see Motion to Dissolve Preliminary Injunction) but the basis for awarding back pay and, indeed, the entire retirement plan is still in issue. It is not enough to say that women paid more to get more. The concept of separate mortality tables forms the whole base for the Plan and there is a genuine factual issue as to the soundness of that concept.

In addition, there are some other issues still to be resolved by the lawsuit.

Attached hereto, as Exhibits "A" and "B", and incorporated herein by reference are copies of the Affidavits of Harry M. Church and Allan F. Larson previously filed with the Court, as part of and attached to defendants' Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction.

I
STATEMENT OF GENUINE ISSUES

Conceding that from March 24, 1972 through December 31, 1974, the "Plan" provided for higher contribution rates for females, defendants submit that there still exists the following genuine issues:

1. Did the "Plan" actually discriminate against the female employees so as to entitle them to recover back contributions?

2. Is there a valid economic purpose for requiring higher contribution rates for females under the "Plan"?

3. What are the actuarial differences in life expectancy between male and female employees of the Department?

4. Are the actuarial findings and statistics upon which contribution rates are established reasonably accurate and valid?

5. What is the effect of equalizing contribution rates and monthly benefits upon "Plan" beneficiaries? Does it, in fact, comply with Title VII?

6. How much has each class covered by this action been damaged?

7. Is each of the classes represented entitled to any refund hereunder?

II
SUMMARY JUDGMENT IS NOT PROPER IF GENUINE ISSUES OF FACT REMAIN TO BE RESOLVED BY THE COURT

A trial is absolutely necessary where there is a genuine issue as to any material fact [6 Moore, Federal Practice Para. 5.15(1) at 2281 (1974)].

"[T]he court, on a motion for summary judgment, cannot *try* issues of fact but can only determine whether there *are* issues of fact to be tried; and, once having determined this affirmatively must lease those for determination at a trial."

> *Empire Electronics Co. v. United States,* 311 F.2d 175, 179, 6 F.R. Serv. 2d 56c.41 Case 11 (2d Cir. 1962)

"Summary judgment of course is proper only where there is no genuine issue as to any material fact. Rule 56(c) F.R. Civ. P. The *movant* has the burden of clearly demonstrating the absence of any genuine

issues as to all the material facts applicable under his theory of the law, and a party opposing summary judgment is entitled to the benefit of all favorable inferences that may be drawn from the evidence. The court may not weigh or resolve issues." (Emphasis added.)

G.S. Leonard et al. v. BHJK Corporation, 469 F.2d 108, 110 (D.C. Cir. 1972)

III

IF THE MOTION IS GRANTED, DEFENDANTS WILL BE DENIED THE OPPORTUNITY TO MAKE A COMPLETE RECORD OF THE BASES FOR DIFFERENT CONTRIBUTION RATES AS A PART OF THE TOTAL RETIREMENT PLAN

The importance of affording defendants a full opportunity to make their record in this lawsuit cannot be over-emphasized. *Geduldig v. Aiello,* 415 U.S. 973, 8 FEP 97, 7 EPD Para. 9432 (1974) was the case involving the California disability insurance program, in which the Supreme Court upheld the refusal to grant certain pregnancy benefits against a challenge that such violated the Equal Protection Clause of the Fourteenth Amendment. In that case, the presentation of all the facts involving the disability program, together with its costs and the costs of providing pregnancy benefits, led to the ruling in favor of the program. As stated by the court in *Communication Workers of America et al. v. American Telephone and Telegraph Company,* .... F.2d .... 9 CCH, EPD ¶ 10,035, p. 7279; (2d Civ. 1975) (a Title VII case involving pregnancy benefits, which the court refused to dismiss on the rationale of the *Aiello* case) at p. 7283:

> "Finally, it should be noted that in the case at bar, in contrast to *Aiello,* only the bare allegations of the complaint couched in general language, largely taken from the statute and the guidelines, were before the district court. *Aiello* was decided on a full record in which the nature, details, operations and effect of the state insurance plan under attack and the reasons for its enactment were fully explored. The ultimate merits of the case at bar are not ripe for determination on such a record or at this stage of the proceedings."

Defendants believe that given a complete picture of the nature, details, operations and effect of each of the provisions of the defendants' Plan and the actuarial bases therefor, the Court will be in a far better position to determine wheher in fact such plan did operate in violation of Title VII.

The plaintiffs cite *Chastang v. Flynn & Emerick Co.,* 365 F. Supp. 957, 6 F.E.P. Cases 357 (D.Md. 1973) as authority for giving immediate judgment and referring the question of damages to a master. However, in that case, trial of the liability portion of the case had been litigated to completion (supra p. 959). Such is not the case here. We have only tried the advisability of issuing a preliminary injunction. Furthermore, we submit even that issue was moot at the time of the granting of the injunction. (See Motion to Dissolve Preliminary Injunction filed heretofore by defendants.)

In a similar vein was *Phillips v. Martin Marietta Corp.,* 400 U.S. 542, 91 S. Ct. 496, 3 FEP 40 (1971) wherein the Supreme Court remanded a Title VII case dealing with refusal to hire women with pre-school age children, for evidence to be presented on the ques-

tion of whether such restriction was a bona fide occupational qualification. Although the court overruled the employer's motion for summary judgment, it expressly recognized that "[t]he existence of such conflicting family obligations [i.e. need to care for pre-school children] if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under §703(e) of the Act." (*supra* p. 544). If the Supreme Court felt that it was necessary to allow the employer to show the validity of such employment condition, then surely defendants herein should be permitted the same opportunity, where even plaintiffs concede the validity of the basic premise that women live longer than men (Statement of Reasons and Memorandum of Points and Authorities in Support of Preliminary Injunction, pages 16 and 17).

IV

ANY AWARD OF BACK PAY IS INEXTRICABLY INTERWOVEN WITH PROOF OF THE IMPROPRIETY OF DEFENDANTS' PLAN PROVISIONS AND REQUIRES A FULL TRIAL ON THAT ISSUE ALONE

Damages under Title VII are discretionary with the Court. Section 706 (g) thereof [42 U.S.C. §2000e-5(g)] provides, in part:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees

> with or without back pay . . . or any other equitable relief as the court deems appropriate."

Plaintiffs cite *Johnson v. Georgia Highway Express, Inc.*, 417 F. 2d 1122, 2 FEP Cases 231 (5th Cir. 1969) as authority for awarding them back pay to reimburse them for their "losses". That case notes at page 1125 that awards of back pay are discretionary. It is to this discretion that defendants would respectfully address themselves in conducting their defense.

First, it is the position of defendant that plaintiffs in fact lost nothing by paying a higher contribution rate (See Affidavit of Harry M. Church, page 3, Affidavit of Allan F. Larson, pages 2 and 3, and Supplemental Affidavit of Allan F. Larson, page 1). In order to prove this to the Court is will be necessary to explain how the retirement plan works and the actuarial basis for each provision thereof. It will also be necessary to show both the general difference in longevity between men and women and the Department's experience and treatment of longevity. We submit that the greater the difference in life expectancy and percentages of Department employees and retirees which meet that expectancy, the greater the validity of defendants' Plan. In the alternative, the establishment of a *valid* single unisex mortality table is also a genuine issue in the light of the whole Plan.

Second, defendants' conduct was approved by two competing agencies of the federal government, which to our knowledge have still not changed their standards, i.e. the Office of Federal Contract Compliance and the Wage and Hour Administrator of the Department of Labor. (We respectfully refer the Court to our

Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, pages 9-14). As stated in the 1974 Sex Discrimination Guidelines of the Office of Federal Contract Compliance (41 CFR Section 60-20.1(c) p. 287):

> "[T]he employer will not be considered to have violated these guidelines if his contributions are the same for men and women *or* if the resulting benefits are equal." (Our emphasis.)

In fact, it was not until 1974 that the Equal Employment Opportunity Commission changed its standards to require *both* equal contributions *and* equal benefits (Decision No. 74-118, CCH EEOC Decisions Para. 6431 Employment Practices Guide, 1974).

If, as the Court noted in its opinion relative to the preliminary injunction herein, the EEOC Decision of 1974 (74-118) is entitled to great deference (*Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434, 9 S. Ct. 849, 3 FEP 175 (1971)), then surely prior to 1974 the administrative determinations of the Wage and Hour Administrator and the Office of Federal Contract Compliance were likewise entitled to great deference. That being the case, defendants should be allowed to establish such compliance as a matter of trial from all that was known to defendants during the period prior to Decision 74-118.

The Fair Labor Standards Act (including the Equal Pay Act of 1963) sets forth the equal pay requirements [29 U.S.C. §206 (d) (1)]:

"No employer shall discriminate . . . between employees on the basis of sex by paying wages . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . ." Any time an

employer pays the additional cost of funding extra retirement benefits due a female because of her longevity, he is automatically paying her a higher salary than her male counterpart. In order to comply with such Act, and in accordance with the cited ruling of the Wage and Hour Administrator, we submit the most appropriate procedure was that followed by the Department.

V

A DETERMINATION MUST BE MADE WHETHER DEFENDANTS' USE OF SEX-ORIENTED MORTALITY TABLES FITS WITHIN THE BONA FIDE OCCUPATION QUALIFICATION EXCEPTION OF TITLE VII

Section 703(e) of Title VII [42 U.S.C. §2000e-2(e)] states in pertinent part:

> "Notwithstanding any other provisions of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ."

While we recognize plaintiffs take the position that this "BFOQ" exception only applies to hiring (Statement of Reasons and Memorandum of Points and Authorities in Support of Preliminary Injunction, page 30), we know of no case that so holds. In fact, the case cited by plaintiffs in their motion for Summary Judgment, (*Chastang v. Flynn & Emerick Company*, 365 F.Supp. 957, 965, 6 FEP Cases 357 (D. Md. 1973) considered the application of the "BFOQ" exception to provisions of a retirement plan. The court

noted that pension plans were part of the compensation, terms and conditions of employment and analyzed the rationale for the plan's provisions under the "BFOQ" exception. While the court did not find the "BFOQ" requirements satisfied, it nevertheless applied them.

As noted in *Diaz v. Pan American World Airways, Inc.*, 442 F. 2d 385, 388 (5th Cir. 1971) cert. denied, 404 U.S. 950, 92 S. Ct. 275, 30 L.Ed. 2d 267 (1971), the bona fide occupational qualification exception is narrowly construed and turns upon the "business necessity" of the particular qualification. That is to say, discrimination based on sex is valid only when the essence of the business operation would otherwise be undermined (*Diaz, supra* p. 388).

The City Charter, of which the Court may take judicial notice, requires that the Department of Water and Power establish and maintain a retirement plan, which shall be maintained "in accordance with sound business practices and recognized actuarial methods." (Los Angeles City Charter Section 220.1)

Applying the "business necessity" test to defendants' Plan, we believe we can demonstrate the following:

1. No unisex actuarial table for the measurement of annuities existed at the time Title VII first became applicable to defendants, and none exists now (See Supplemental Affidavit of Harry M. Church).

2. Such a table works to the disadvantage of men as a group. (See Supplemental Affidavit of Harry M. Church).

3. Defendants' plan was based on providing the fairest benefits actuarially for all its employees at the fairest rates while maintaining sound financial condition. (See Supplemental Affidavit of Allan F. Larson)

VI

A VALID ECONOMIC PURPOSE EXISTS FOR THE DIFFERENCE IN CONTRIBUTION RATES BETWEEN MALE AND FEMALE EMPLOYEES

The underlying basis for the difference in contribution rates for female employees rests upon the actuarially established fact that female employees have a longer life expectancy than their male counterparts. The higher contribution rate attempts to maintain an equal economic benefit and burden to both sexes.

Courts have recognized that where a classification is based upon an "economic purpose" such as exists here, there is no discrimination under Title VII (Local 189, *United Papermakers and Paperworkers v. United States* (1969) 416 F.2d 980, 992). Defendants should be permitted the opportunity to prove the economic purpose and necessity herein.

VII

THE ACCURACY AND RESULTS OF DEFENDANTS' ACTUARIAL STATISTICS AND FINDINGS ARE TRIABLE ISSUES OF FACTS

Even if plaintiffs accept the fact that women live longer than men, they clearly do not concede that *all* women will live longer than *all* men. Thus, there is clearly a triable issue of fact that must be considered by this court, as well as any appellate court which may rule in the matter, regarding the results and validity of defendants' actuarial statistics and assumptions.

That life expectancy is a valid measure of a retirement plan, in and of itself, is impliedly recognized by Congress in the Age Discrimination in Employment

Act (29 U.S.C. §620 et seq.) enacted after Title VII. Section 4(f)(2) of said Act specifically provides:

> "It shall not be unlawful for an employer, (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension or insurance plan . . ."

It is obvious that Congress in permitting persons to be retired under a bona fide retirement plan, even though below the age protected under the Act, was aware that all such plans are funded and paid on an actuarial basis. (Parenthetically, we submit this exception is also further evidence, in addition to the legislative history set forth previously at pages 5-8 of defendants' Points and Authorities in Opposition to the Motion for Preliminary Injunction, of Congressional intent not to disturb the actuarial bases for retirement systems.)

In its Memorandum and Order Granting Plaintiffs' Motion for Preliminary Injunction, the Court noted that a particular Harvard Law Review Comment [84 Harv. L. Rev. 1109, 1172-1176] took the position that employers must provide the same life insurance benefits to male and female employees even though employers must pay higher premiums for males than for females due to actuarial female longevity. The Court then also noted that Congress intended to strike at the entire spectrum of disparate treatment of individual men and women resulting from sex stereotypes; that all stereotypic treatment of persons based on sex, whether rational or irrational was dead.

Surely, ignoring the fact of mortality probabilities is far more certain to result in disparate treatment of men and women than otherwise. If such is even

possibly the case, then defendants should be permitted to show the need for separate mortality tables to avoid actual stereotypic treatment. Otherwise, the result is a reverse discrimination in the sex discrimination area.

While it is true that the cost of paying for the additional years of benefits enjoyed by females under an equalized contribution rate, could be borne by the Plan, it must be apparent that such amounts to a higher level of pay to females.

VIII
OTHER ISSUES REMAIN TO BE DETERMINED

Finally, even the determination of damages, if due, is not a simple one. For example, under one provision of the "Plan", women who have resigned from service but left their contributions on deposit are able to obtain a "vested rights" retirement upon reaching retirement age. That retirement is measured by the total amount of contributions they and the Department have on deposit, i.e., a money purchase pension. If contributions are returned, these individuals will receive a smaller pension when they retire because they will have less money on deposit. (See Supplemental Affidavit of Allan F. Larson.)

Additionally, it is not clear this last class of plaintiffs is even properly represented by anyone with standing in this action. There is a question as to whether the unnamed plaintiffs in this class are even aware of the possible detrimental effect of a refund of contributions. Furthermore, this will also affect some active employees.

Of course, there is even a question whether awarding damages against defendants, an agency of local gov-

ernment, may not be a violation of the Eleventh Amendment to the Constitution, [*Edelman v. Jordan,* 415 U.S. 651, 94 S. Ct. 1347; 39 L.Ed.2d 662 (1974), *Fitzpatrick v. Bitzer,* 8 EPD ¶9685, p. 5878 (1974)] anyway.

CONCLUSION

It appears that both plaintiffs and defendants would benefit from a full presentation of the Plan and determination of the correctness of the actuarial assumptions upon which it is based. We therefore respectfully request that the plaintiffs' motion be denied.

DATED: May 15, 1975.

Respectfully submitted,

BURT PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power
DAVID J. OLIPHANT,
Deputy City Attorney

By /s/ David J. Oliphant
David J. Oliphant
Deputy City Attorney

111 No. Hope Street
P.O. Box 111
Los Angeles, California 90051
Attorneys for Defendants

United States District Court, Central District of California.

EXHIBIT A.

Affidavit of Harry M. Church.

[Title Omitted in Pringing]

State of California, County of Los Angeles—ss:

HARRY M. CHURCH, being duly sworn, deposes and says:

I am a partner in the firm of Coates and Crawford, Consulting Actuaries; I have continuously engaged in the actuarial consulting practice since 1952; I am an Associate of the Casualty Actuarial Society; Associate of the Society of Actuaries; Member of the American Academy of Actuaries; and Member of the Western Pension Conference; I am the consulting actuary for the Department of Water and Power Retirement Plan and have been since February 1, 1957; I also serve as consulting actuary to numerous other public retirement systems.

In my professional opinion, women live longer and have a greater life expectancy than men. The bases for my opinion are the following:

(1) I have personally conducted numerous statistical studies of male and female mortality including a number of studies conducted on Department of Water and Power employees—most recent of which was as of June 30, 1972. Each study involves a scientific determination of the probability of mortality of a determined group of individuals.

(2) Our firm has conducted numerous other mortality studies over a period of many years and I am cognizant of mortality studies conducted by others

throughout the nation. Mortality tables for annuity and pension purposes are established from and in accordance with such professionally conducted studies of mortality. All studies and mortality tables of which I am aware reflect the fact that women live longer than men.

(3) Every public retirement system in the State of California of which I am aware reflects the difference in mortality between men and women.

Sound actuarial practice requires that annuity or pension plans be based on averaging of life expectancies of persons in ascertained classes (usually age and sex) since the life expectancy of a specific person cannot be predetermined.

The Department of Water and Power Retirement Plan is designed to provide that female employees pay an equal proportion of the total cost of their benefits as male employees pay for theirs. The Plan is also designed to pay the same benefits per month to men and women; but because the life expectancy of women is longer, the total payout to women is greater. Because female employees of the Department live longer than male employees and the total payout to females is greater, it necessarily follows that female contribution rates must be higher than male contribution rates. However, if a man and woman each make equal monthly contributions during their working lives, then the return to each during their retired lives (i.e., the total of their respective pension allowances) will be substantially equal, with women receiving somewhat greater benefits.

In addition, the Plan provides four optional benefit programs which the employee may elect upon retirement. All four of these options provide both a greater monthly as well as total benefit to women than they provide to men.

With respect to surviving eligible spouse benefits that are available to both male and female employees, Department employees do not contribute for such benefits.

As a result of my most recent (1972) mortality study, the Board of Administration of the Retirement Plan adopted the 1951 Group Annuity Mortality Table. This table is published in the Transactions of the Society of Actuaries and is used extensively by both public and private retirement systems to reflect the mortality of retired lives. Consistent with other pension and annuity tables, this table provides separate tables for men and women.

Contribution rates of Department women are 14.84% higher than the contribution rates of men under the Retirement Plan. This factor was calculated by us and reflects the relationship between the life annuity values at age 65 for men and women based upon the 1951 group annuity mortality table.

If the female contribution rates to the Retirement Plan are reduced to the male contribution rate level and no additional changes are made, then the retirement plan will not be properly funded, i.e., assets on hand plus future contributions made to the Fund will not be adequate to provide the benefits that have been promised. In other words, the total actuarial liabilities of the Plan will exceed the total actuarial assets.

/s/ Harry M. Church
HARRY M. CHURCH

Subscribed and sworn to before me this 1st day of October 1974.

/s/ Inez P. Egan
Notary Public in and for the County of Los Angeles, State of California

[Seal]

United States District Court, Central District of California.

EXHIBIT B

Affidavit of Allan F. Larson.

[Title Omitted in Printing]

State of California, County of Los Angeles—ss:

ALLAN F. LARSON, being duly sworn, deposes and says:

I am the Administrator-Secretary for the Board of Administration of the Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan; I am the custodian of all the records of the Plan; I have served as the Administrator-Secretary since June 1970, and for the five preceding years I served as the Assistant Administrator-Secretary; I have been an employee of the Department of Water and Power for more than 38 years.

A woman employee pays into the Retirement Fund approximately 14.84% more than a man entering the Retirement Plan at the same age. In addition to other Department payments to the Retirement Fund, the Department pays each month at the rate of 110% of the employee payments. For example, if a man contributes $1.00, the Department contributes $1.10 for his account. A woman who entered the Retirement Plan at the same age as the man would contribute $1.15 and the Department would contribute $1.26 for her account.

The preceding contribution ratios are necessary to satisfy the following basic design concepts of the Plan:

1. Women's monthly retirement allowances should equal those provided men with the same age

at employment and retirement and with the same Department service and salary history.

2. Women should contribute to the Retirement Fund the same proportion to the total moneys as contributed by men, required to pay their respective retirement allowances for their respective expected lives at retirement. As women live longer, they should contribute on a higher basis.

Periodic actuarial studies of the deaths of former employees receiving monthly service retirement pensions consistently disclose that Department women outlive Department men, and that this difference in average life expectancy is widening.

Based upon the general actuarial survey and evaluation of the Retirement Plan most recently completed on June 30, 1972, the Board of Administration adopted the "1951 Group Annuity Table" published in the transactions of the Society of Actuaries. This table has been adopted for Plan use in determining the total moneys which must be set aside for lifetime retirement allowances of employees upon their retirement. The table was adopted because it, better than other mortality tables, would have predicted the deaths of persons receiving service retirement pensions from the Plan.

To require that women contribute at the same rates as men and still provide that women receive the same monthly retirement allowance as men with no other changes to the Retirement Plan will result in improper funding of the Retirement Plan; this is, assets on hand plus future contributions made to the fund will not be adequate to provide the benefits that have been promised.

If the Department's monthly contributions to the Retirement Fund were increased by an amount equal to the difference between male and female present contribution rates, the Department's expected total retirement compensation for women retiring at age 65 (under formula retirement pensions) would be at least 17.5% greater than for men retiring at age 65. This difference is exclusive of cost of living adjustments which currently provide additional compensation to retirees. Since Department women live longer than Department men, they receive cost of living adjustments over a longer period than men. If 3% cost of living adjustments are granted each year, the Department's expected total contributions would be 30% greater for women than for men.

Alice F. Muller was appointed to the Board of Administration of the Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan and attended her first meeting on January 25, 1968. She was then elected to serve a three-year term starting October 13, 1968. Ms. Muller filed a letter of resignation with the Board on December 19, 1968 (a copy of that letter is attached hereto).

Carolyn Mayshack's annual salary, based on 2088 hours a year, is $11,784. On an hourly basis, this is equivalent to $5.644 per hour. Her monthly salary, based on 174 hours, is $982. Ms. Mayshack is paid every two weeks or for an 80-hour work period. For a four-week period, or 160 hours, she would gross $903.04.

Federal and state income taxes are withheld from Ms. Mayshack on the basis of her being married and claiming one exemption (herself). The federal income tax withheld for each two-week pay period is $67.13;

the state income tax withheld is $7.49. If Ms. Mayshack were to claim an exemption for herself and two dependents, the amount of income taxes withheld would be $55.20 and $4.80 for federal and state respectively.

Contributions to the Retirement, Death and Disability Funds are deducted from twelve of the twenty-six bi-weekly pay period checks per year. For Ms. Mayshack, a total of $57.23 a month is deducted. Of this amount $6.14 is contributed to the Disability Fund; $3.51 is contributed to the Death Benefit Fund, and $47.58 is contributed to the Retirement Fund. Her male counterpart would pay $41.44, or $6.14 less than Ms. Mayshack, to the Retirement Fund, and he would pay identical amounts as Ms. Mayshack to the other two funds.

Ms. Mayshack's "take-home pay" after withholding for federal and state income taxes and contributions to the three funds averages $704.39 for a four-week period (160 hours) and is $762.41 for a monthly period (174 hours). If Ms. Mayshack were to claim two additional exemptions for her dependents, her take-home pay would be $733.63 for a four-week period and $794.27 for a monthly period.

/s/ Allan F. Larson
ALLAN F. LARSON

Subscribed and sworn to before me this 11th day of October 1974.

/s/ Sylvia F. Hoffman
Notary Public in and for the County
of Los Angeles, State of California

[Seal]

December 17, 1968

The Board of Administration
Water and Power Employees
Retirement Plan
Building

Gentlemen:

With regret I tender my resignation as a member of the Board of Administration of the Retirement Plan, effective immediately. I have been appointed to a new position in the Power System, and will be unable to continue as a Board member.

Though I have long dreamed of working on a power construction project, my appointment to such a job seemed outside the realm of possibility, even as recently as the Retirement Board election. I apologize for the break in continuity my resignation is causing, but I feel that I must give all my energy and attention to my new job—and it is only fair that the employees in the Joint Group be represented by one of their own.

It has been a pleasure and a valuable experience to serve on the Board, and I shall miss it, and each of you, more than you can imagine. I leave you, knowing that our Retirement Plan is well-administered, and that my bright and not-too-distant future as a retired employee is in the hands of a Board that is earnest, knowledgeable, and progressive.

Sadly,
/s/ Alice Muller

Mr. Benson moved that Miss Muller's resignation be accepted with regret. Mr. Nystrom seconded the motion.

Ayes: Members: Benson, Luhring, Nystrom, Kanouse, Sachau, Mullin

Noes: None

—Letter attachment
LARSON Affidavit—

United States District Court, Central District of California.

EXHIBIT C

Supplemental Affidavit of Harry M. Church.

Marie Manhart, et al., Plaintiffs, vs. City of Los Angeles, Department of Water and Power, et al., Defendants. Civil Action No. 73-2272-HP.

State of California, County of Los Angeles—ss:

HARRY M. CHURCH, being duly sworn, deposes and says:

I am the consulting actuary for the Department of Water and Power Retirement Plan and have been since February 1, 1957. This affidavit is supplemental to my previous affidavit filed with the Court and subscribed and sworn to by me on the 11th day of October 1974.

In my professional opinion, the plaintiffs in this lawsuit suffered no financial losses as a result of being required to pay a higher contribution rate than their male counterparts because under the Department's Retirement Plan men and women of the same age pay the same proportion of their total expected benefits.

The Plan funds the cost of benefits, like all annuity plans, based upon the life expectancy of its beneficiaries. Life expectancy and mortality tables are universal throughout the western commercial world in separating male mortality rates from female mortality rates. As recently as 1971, the Society of Actuaries published mortality tables which separate males from females in measuring life expectancy.

To my knowledge, no tables have yet been developed which measure life expectancy for annuity purposes

on a unisex basis. To use unisex mortality tables could lead to a result which adversely affects the financial integrity of an annuity or pension system such as the Department of Water and Power Retirement System.

When you reduce female contribution rates to the same as male, with the same monthly benefits, the employer must make up the difference in cost of the plan. This obviously works to the detriment of the male employee in that the employer is, in effect, providing more money for females that retire than males that retire.

/s/ H. M. Church
HARRY M. CHURCH

Subscribed and sworn to before me this 15th day of May 1975.

/s/ Inez P. Egan
Notary Public in and for the County
of Los Angeles, State of California

[Seal]

United States District Court, Central District of California.

EXHIBIT D

Supplemental Affidavit of Allan F. Larson.

Marie Manhart, et al., Plaintiffs, vs. City of Los Angeles, Department of Water and Power, et al., Defendants. Civil Action No. 73-2272-HP.

State of California, County of Los Angeles—ss.

ALLAN F. LARSON, being duly sworn, deposes and says:

I am the Administrator-Secretary for the Board of Administration of the Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan (hereafter "Plan"). This affidavit is supplemental to my previous affidavit filed with the Court and subscribed and sworn to by me on the 11th day of October 1974.

I am familiar with and fully understand the operation of the Retirement Plan, being responsible therefor as its Administrator-Secretary.

In my opinion, due to the actuarial bases of the Plan, none of the plaintiffs suffered any monetary losses as a result of paying a higher contribution rate to the Retirement Fund during the period from March 24, 1972 through December 31, 1974 and prior thereto.

If called as a witness, I will introduce, outline and explain the retirement provisions of the Plan and show that they were designed to treat men and women equally in all phases during the period for which damages are sought; that certain provisions appear to favor men and other women, as a result of the use of separate mortality tables but that in fact those provisions

are designed to, and do, provide equal treatment in the ultimate benefits for both.

Under the "vested rights" retirement provisions of the Plan, a person with more than one year's service may resign from the Department and leave his contributions on deposit until normal retirement age, when he may receive a retirement allowance based upon his total contributions on deposit and the Department's 110% matching funds. To the extent contributions are returned to him now that allowance must be reduced.

/s/ Allan F. Larson
ALLAN F. LARSON

Subscribed and sworn to before me this 15th day of May 1975

/s/ Sylvia F. Hoffman
Notary Public in and for the
County of Los Angeles, State of
California

[Seal]

[Affidavit of Service Omitted in Printing]

United States District Court, Central District of California.

Findings of Fact and Conclusions of Law.

[Title Omitted in Printing]

Filed: June 20, 1975.

On May 29, 1975, plaintiffs' motion for summary judgment was heard by the court. Having considered the pleadings, affidavits, and papers on file and the oral arguments of counsel, the court being fully advised in the premises, makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

It is true that:

1. The plaintiffs, Carolyn Mayshack, Margerie Stoop, Alice F. Muller and Ethel L. Lehman, are employees of the defendant, Department of Water and Power of the City of Los Angeles ("Department"). The plaintiff, Marie Manhart, is a former employee of the Department. The plaintiff, Committee to Protect Women's Retirement Benefits, is an association of female, supervisory employees of the Department. The plaintiff, International Brotherhood of Electrical Workers, Local Union No. 18 ("Union"), is an unincorporated labor organization, whose members include certain women who are employed by the Department.

2. The defendant, Department of Water and Power of the City of Los Angeles, employs approximately 2,000 females. The defendant, Board of Commissioners of the Department of Water and Power, directs the affairs of the Department. The defendant, Board of Administration of the Department of Water and Power Public Employees' Retirement, Disability, and Death

Benefit Insurance Plan, administers the benefit plans maintained for employees of the Department.

3. The Department maintains a Public Employees' Retirement, Disability, and Death Benefit Insurance Plan ("Plan"). The Plan is funded by compulsory employee contributions which are matched 110% by compulsory employer contributions. The Plan is also funded by earnings on all contributions.

4. Between March 24, 1972 and December 31, 1974, the Plan paid the same monthly benefits to male and female retirants of the same age and length of service. However, higher contributions were required of female employees than males because actuarial tables used in the administration of the Plan indicate that women in general live longer than men and that women would therefore tend to collect monthly payments for a longer period of time.

5. On or about June 5, 1973, the Union filed with the Equal Employment Opportunity Commission ("EEOC") a charge alleging that the Plan discriminated against females because it required them to contribute more than their male counterparts. The United States Department of Justice issued a notice of right to sue letter on or about September 17, 1973. The plaintiffs filed a complaint in this court on September 26, 1973.

6. The plaintiffs employed legal counsel, who rendered valuable services to the classes in the litigation of the issues presented in this case.

7. On April 5, 1972, the EEOC amended its regulations to state: "It shall not be a defense under Title [VII] to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." 29 C.F.R. 1604.9(e).

The following Conclusions of Law, insofar as they may be considered Findings of Fact, are so found by this court to be true in all respects.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the plaintiffs' action which was brought pursuant to Section 706(f) of Title VII of the Equal Employment Opportunity Act of 1972 ("Act") (42 U.S.C. § 2000e-5(f)).

2. The plaintiff Union filed a timely charge with the EEOC. After receiving a notice of right to sue letter from the United States Department of Justice, the plaintiffs filed a timely complaint in this court. The plaintiffs have satisfied the jurisdictional prerequisites of the Act for bringing suit in this court.

3. The Department is an employer within the meaning of Section 701(b) of the Act (42 U.S.C. § 2000e (b)).

4. With respect to the cause of action brought under Title VII of the Act, on January 25, 1974, the court certified classes which included (a) all female employees presently working for the Department who are members of the Plan, (b) all female members of the Plan who retired from the active service with the Department on or after March 24, 1972, (c) all female employees who resigned from active service with the Department on or after March 24, 1972 and who left their compulsory employee contributions on deposit with the Plan, and (d) all women hired by the Department who became members of the Plan prior to the resolution of this action.

5. The Department's practice of requiring females to make larger monthly contributions to the Plan than their male counterparts is an unlawful employment

practice within the meaning of Section 701(a)(1) of the Act (42 U.S.C. § 2000e-2(a)) and no defenses under Section 703(e) and (h) of the Act have been stated (42 U.S.C. § 2000e-2(e), (h)).

6. The Eleventh Amendment to the United States Constitution does not bar a money recovery against the defendants in this action.

7. The defendants' should have been placed on notice that their practice of differential contributions constituted an unlawful employment practice under Section 701(a)(1) of the Act when the EEOC amended its regulations on April 5, 1972 to include what is now 29 C.F.R. 1604.9(e).

8. Under Section 706(g) of the Act, each member of the classes defined in Paragraph 4 of these Conclusions of Law is entitled to a refund measured by the difference between the contributions she was required to make on and after April 5, 1972 and the contributions required of a male who entered the service of the Department at the same age, and on the same date, and earned the same rate of pay throughout his service as the female member of the class. In addition, each member of the class is entitled to interest at seven percent (7%) on her overpayments running from the date of contribution.

9. Counsel for the plaintiffs are entitled by Section 706(k) of the Act (42 U.S.C. § 2000e-5(k)) to reasonable attorneys' fees payable by the defendants.

Dated: June 20, 1975.

/s/ Harry Pregerson
Harry Pregerson
United States District Judge

United States District Court, Central District of California.

Notice of Entry.

Marie Manhart, et al., Plaintiff vs. City of Los Angeles, Department of Water and Power, etc. et al., Defendant. Case Number 73-2272-HP.

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEYS OF RECORD:

You are hereby notified that JUDGMENT in the above entitled case was entered in the docket on June 20, 1975.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (*After* sixty days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

[Certificate of Mailing Omitted in Printing]

United States District Court, Central District of California.

Judgment.

[Title Omitted in Printing]

Filed: June 20, 1975.

On May 29, 1975, plaintiffs' motion for summary judgment was heard by the court. Today, the court has filed its findings of fact and conclusions of law. Accordingly,

IT IS ORDERED AND ADJUDGED:

That the practice of the Department of Water and Power of the City of Los Angeles ("Department") which requires female employees to make larger monthly contributions to the Department of Water and Power Employees' Retirement, Disability, and Death Benefit Insurance Plan ("Plan") than their male counterparts is an unlawful employment practice within the meaning of Section 701 (a)(1) of the Equal Employment Opportunity Act of 1972 (42 U.S.C. § 2000e-2(a));

That defendants are permanently enjoined from requiring female employees to make larger contributions to the Plan than their male counterparts;

That (a) each female employee presently working for the Department who is a member of the Plan, (b) each female member of the Plan who retired from active service with the Department on or after March 24, 1972, (c) each female who resigned from active service with the Department on or after March 24, 1972 and who left her compulsory employee contributions on deposit with the Plan, and (d) each female hired by the Department who became a member of the Plan prior to the resolution of this action,

shall be refunded such portion of her contributions made on and after April 5, 1972 which exceeded the contributions of her male counterpart who entered the service of the Department at the same age and on the same date, and earned the same rate of pay throughout his service as the female employee. In addition, each such female employee shall be entitled to interest at seven percent (7%) on her overpayments running from the date of contribution;

That the defendants pay counsel for the plaintiffs reasonable attorneys' fees; and

That each side bear its own costs of suit.

Dated: June 20, 1975.

/s/ Harry Pregerson
Harry Pregerson
United States District Judge

United States District Court, Central District of California.

Notice of Appeal.

[Title Omitted in Printing]

Filed: July 7, 1975.

NOTICE IS HEREBY GIVEN that CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS, defendants above named, appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on June 20, 1975.

Dated: July 29, 1975

BURT PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power
/s/ By David J. Oliphant
DAVID J. OLIPHANT
Deputy City Attorney
Attorneys for Defendants
111 North Hope Street
P. O. Box 111
Los Angeles, California 90051
481-6378

United States Court of Appeals, for the Ninth Circuit.

Marie Manhart, et al., Plaintiffs-Appellees, vs. City of Los Angeles, Department of Water and Power, a body corporate and politic, et al., Defendants-Appellants. No. 75-2729, No. 75-2807, No. 75-2905.

Opinion and Order of United States Court of Appeals filed November 23, 1976, amended December 23, 1976. Reprinted as Appendix C to Petition for Writ of Certiorari.

United States Court of Appeals, for the Ninth Circuit.

[Docket Entries—Title Omitted in Printing.]

Petition for Rehearing and Suggestion that Rehearing be In Banc in the United States Court of Appeals filed December 9, 1976.

Received letter dated December 14, 1976 regarding appellants' additional citations December 16, 1976

Order.

The opinion filed in this case on November 23, 1976, is withdrawn, and an amended opinion, accompanying this order, is ordered filed *nunc pro tunc* as of November 23, 1976.

The court requests that counsel for plaintiffs-appellees shall file, within fourteen days from the date of the filing of this order, a response to the petition for a rehearing and suggestion that rehearing be in banc that was filed on December 9, and to the letter of counsel for appellants that was received by the Clerk on December 16, 1976, with particular reference to the effect, if any, of the decision of the Supreme Court in the case of *Gilbert v. General Electric Company*, Supreme Court No. 74-1589, decided December 7, 1976. Order issued December 23, 1976.

Appellees Reply to Petition for Rehearing filed January 17, 1977.

United States Court of Appeals, for the Ninth Circuit.

[Title Omitted in Printing]

Opinion and Dissenting Opinion of the United States Court of Appeals on Rehearing filed April 18, 1977. Printed as Appendix D to Petition for Writ of Certiorari.

Supreme Court of the United States, Office of the Clerk, Washington, D.C. 20543.

Order Granting Certiorari.

October 3, 1977.

Edward C. Farrell, Esq.
Chief Assistant City Attorney

111 N. Hope Street
P. O. Box 111
Los Angeles, California 90051

Re: City of Los Angeles, Department of Water and Power, et al. v. Marie Manhart, et al.
No. 76-1810

Dear Mr. Farrell:

The Court today took the following action in the above case:

The petition for a writ of certiorari is granted.

Enclosed are memorandums describing the time requirements and procedures under the rules of this Court.

The additional docketing fee of $50, Rule 52(a), is due and payable.

Counsel are admonished that since this case must be ready for argument during the January session of Court, no extensions of time will be granted except in the most extraordinary circumstances.

Very truly yours,

/s/ Michael Rodak, Jr.
Michael Rodak, Jr.
Clerk

Enclosures
AIR MAIL

Supreme Court, U. S.
FILED
JUL 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

KATHERINE STOLL BURNS, Esq.,
ROBERT M. DOHRMANN, Esq.,
HOWARD M. KNEE, Esq.,
SCHWARTZ, STEINSAPIR, DOHRMANN & KREPACK,
Two Century Plaza, Suite 1900,
2049 Century Park East,
Los Angeles, Calif. 90067,
(213) 277-4400,
Attorneys for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Question Presented 1

Statement of the Case 2

The Separate Classification of Men and Women Under Water and Power's Plan Discriminates Against Women Both on Its Face and in Its Impact 4

A. Water and Power's Plan Discriminated Against Women on Its Face 4

B. Water and Power's Pension Plan Discriminated Against Women in Its Impact 9

The Interpretation of the Bennett Amendment in Gilbert Does Not Undermine the Judgment in Manhart 12

Conclusion 14

A. The Court of Appeals Decision Is Not in Conflict With Applicable Decisions of the Supreme Court 15

B. The Court of Appeals Has Not Departed From the Accepted Course of Judicial Proceedings as to Merit the Exercise of the Supreme Court's Supervision 16

TABLE OF AUTHORITIES CITED

Cases	Page
Bartmess v. Drewrys, U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971)	14
Califano v. Goldfarb, ..., U.S. ....., 97 S.Ct. 1021 (1977)	5, 7, 8, 11, 16
Craig v. Boren, ... U.S. ....., 97 S.Ct. 451 (1976)	5, 9, 16
Frontiero v. Richardson, 411 U.S. 677 (1973) ..	5, 7, 9, 11, 16
General Elec. Co. v. Gilbert, ... U.S. ....., 97 S.Ct. 401 (1976)	4, 5, 8, 9, 10 11, 12, 13, 14, 15, 16
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	5
Henderson v. Oregon, 405 F.Supp. 1271, 1277, appeal docketed, No. ....., 9th Cir. 1976 ..	10, 11
Jefferson v. Hackney, 406 U.S. 535 (1972)	5
Magnum Co. v. Coty, 262 U.S. 159 (1923)	14
Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971)	11, 16
Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969)	14
Reed v. Reed, 404 U.S. 71 (1971)	5, 9, 16
Rosen v. Public Service Gas and Elec. Co., 477 F. 2d 90 (3rd Cir., 1973)	14
Stanley v. Illinois, 405 U.S. 645 (1972)	7, 15

Regulations	Page
29 Code of Federal Regulations, Sec. 1604.9(e)	3
29 Code of Federal Regulations, Sec. 1604.9(f)	3

Rules	
Rules of the Supreme Court, Rule 19	14

Statutes	
California Constitution, Art. I, Sec. 1	3
California Constitution, Art. I, Sec. 21	3
California Government Code, Sec. 7500	3, 17
Civil Rights Act of 1964, Sec. 703(h)	12
Los Angeles City Charter, Sec. 220.1	12
United States Code, Title 29, Sec. 206(d)	12, 13
United States Code, Title 42, Sec. 1983	3
United States Code, Title 42, Sec. 2000-2(a)(1)	3
United States Code, Title 42, Sec. 2000-2(a)(2)	3
United States Code, Title 42, Sec. 2000e-2	2
United States Code, Title 42, Sec. 2000e-2(h)	12
United States Constitution, Fourteenth Amendment	3, 5

Textbook	
Legislative History of the Equal Employment Opportunity Act of 1972, United States Senate (U.S. Government Printing Office, Washington, D.C., 1972), p. 1844	14

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Question Presented.

The question presented in this case is as follows: Whether a retirement plan which required women employees to contribute from their wages 15 percent more than similarly situated male employees, because of the purported longer average life expectancy of women

as a class, thereby violated the Civil Rights Act of 1964, Title VII, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-2 ("Title VII").[1]

Statement of the Case.

This is a class suit by female employees of the Los Angeles Department of Water and Power ("Water and Power") who are participating, or who have participated, in the Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan ("Plan" or "Pension Plan"). Plaintiffs brought suit on September 26, 1973 against Water and Power, members of the Board of Water and Power Commissioners ("Water and Power Commissioners") and members of the Board of Administration of Water and Power's Plan ("Plan Administrators"). Plaintiffs sued Water and Power Commissioners and Plan Administrators in their official capacities.

Water and Power's Plan required women to contribute from their wages 15 percent more to the Plan than men to receive the same benefits as men. This 15 percent differential was based on sex-segregated tables which purported to show that as a class women outlive men. Plaintiffs sought an injunction ordering defendants to equalize male and female contribution rates under the Plan and to grant class members restitution of money they were illegally forced to contribute to the Plan in excess of contributions made by their male counterparts.

---

[1]Plaintiffs do not agree with the Questions Presented as set forth in defendants' Petition for Writ of Certiorari. Whether Water and Power's practice violated the Equal Pay Act is not at issue in this case. See *infra* at page 13.

The District Court permanently enjoined defendants under Title VII from requiring female Water and Power employees to make larger contributions to the Plan than their male counterparts.[2] The Court further awarded class members refunds of illegally required contributions made on and after April 5, 1972.[3] California Government Code §7500 made it unlawful after January 1, 1975 for Water and Power to operate its Plan with unequal male and female employee contributions. Accordingly, Water and Power equalized contribution rates effective January 1.

The District Court's decision in favor of plaintiffs was affirmed by the Ninth Circuit Court of Appeals on November 23, 1976 (amended December 23, 1976) and a rehearing was denied on April 18, 1977.[4] Defendants filed a Petition for Writ of Certiorari on June 29, 1977.

---

[2]Title VII prohibits "[discrimination] against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex. . . ." It also proscribed the *segregation* or *classification* of employees "in any way which would deprive . . . any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex. . . ." 42 U.S.C. §2000-2(a)(1),(2).

[3]On April 5, 1972, the Equal Employment Opportunity Commission amended its regulations to prohibit contribution rate differentials based on sex in employee benefit plans like the Plan at bench. The new regulations provide that "it shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other," 29 C.F.R. §1604.9(e), and "it shall be an unlawful employment practice for an employer to have a pension or retirement plan . . . which differentiates in benefits on the basis of sex." 29 C.F.R. §1604.9(f).

[4]Plaintiffs also brought suit under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §1983 and Article I, §§1 and 21 of the Constitution of the State of California [§21 is now embodied in §7(a)]. Plaintiffs' cause of action under the Fourteenth Amendment is still alive. Although the District Court dismissed plaintiffs' other causes of action, the Court of Appeals declined jurisdiction of these matters on the ground that the District Court's order of dismissal was not final.

The Separate Classification of Men and Women Under Water and Power's Plan Discriminates Against Women Both on Its Face and in Its Impact.

The Court in *General Elec. Co. v. Gilbert*, ... U.S. ...., 97 S.Ct. 401 (1976), set forth two tests for determining whether an employee benefit plan discriminates on the basis of sex in violation of Title VII:

(1) Is the plan discriminatory on its face; and, if not,

(2) Is the plan discriminatory in its impact?

Water and Power's Plan failed *both* these tests: It discriminated against women on its face and it discriminated against women in its impact.

A. Water and Power's Plan Discriminated Against Women on Its Face.

The classification tables used by Water and Power to determine employee contributions to its Pension Plan were based wholly on sex. Every man was treated like every other man and differently from every woman. Other more relevant factors affecting longevity of life, such as smoking and drinking habits, normality of weight, prior medical history, and family longevity history, were not used in determining contribution rates. The opinion of the Court of Appeals was narrowly circumscribed to this set of facts:

> "We do not pass judgment on the legality of a plan which determines contribution rates based on a significant number of actuarially determined characteristics, one of which is sex. Our holding is limited to the proposition that when sex is singled out as the only, or as a predominant, factor, the employee is being treated in the manner which Title VII forbids." 553 F.2d at 591.

The Court in *Gilbert* suggested, because of the similarities between the language used by Congress in Title VII and some of the decisions construing the equal protection clause of the Fourteenth Amendment, "that the latter are a useful starting point in interpreting the former." .... U.S. at ...., 97 S.Ct. at 407. We will begin our analysis here.

Where legislative classifications are based on sex, the Court has adopted an intermediate standard of scrutiny requiring more than just a rational connection between the classification and the statutory objective. *Cf. Jefferson v. Hackney*, 406 U.S. 535 (1972).[5] This standard was recently set forth by the Court in *Craig v. Boren*, ... U.S. ...., 97 S.Ct. 451 (1976): "To withstand Constitutional challenge, previous cases establish that classifications by gender must serve *important governmental objectives* and must be *substantially related* to the achievement of those objectives." .... U.S. at ...., 97 S.Ct. at 457. (Emphasis added.) On this basis, the Court held that the interest of the State of Oklahoma in traffic safety did not justify a statutory scheme prohibiting the sale of "non-intoxicating" 3.2 percent beer to males under the age of 21 but permitting it to females over the age of 18. See *Califano v. Goldfarb*, ... U.S. ...., 97 S.Ct. 1021 (1977); *Frontiero v. Richardson*, 411 U.S. 677 (1973); and *Reed v. Reed*, 404 U.S. 71 (1971).

The legislative purpose underlying Water and Power's Plan is twofold: (1) To provide retirement income

---

[5]This higher standard is of special importance in Title VII cases where the purpose of the statute is to require employers to treat each employee as an individual, so that the employee's membership in a racial, ethnic, religious, or sexual group is irrelevant to employment decisions. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

to Plan participants; and (2) To provide an incentive for qualified job applicants to choose employment with, and remain at, Water and Power. The use of sex-segregated classification tables by Water and Power to determine contribution rates bore no "fair and substantial relation" to these objectives.

Although Water and Power's Plan provides equal benefits to male and female retirees, it charged its female employees 15 percent more for these benefits than its male employees. Water and Power has attempted to justify this contribution rate differential on the ground that it was necessary to the fiscal integrity of the Plan.

While Water and Power's justification may appear reasonable at first, on closer examination, its weaknesses become apparent. Thus, the Court of Appeals found that:

> "Even if it could be said that the relevant business function here involved is that of providing employees with a stable and secure pension program there is no showing that sexual discrimination is necessary to protect the essence of that function. Actuarial distinctions arguably enhance the ability of the employer and the pension administrators to predict costs and benefits more accurately, but it cannot be said that providing a financially sound pension plan requires an actuarial classification based wholly on sex." 553 F.2d at 587.

The Court went on to find that "[t]his is especially true when distinctions based on many other longevity factors (*e.g.*, smoking and drinking habits, normality of weight, prior medical history, family longevity history) are not used in determining contribution levels." 553 F.2d at 587.

Water and Power's decision to use gender based classification tables to determine contribution rate levels to its Plan was based on only one criterion: Administrative convenience. Although this objective may have some importance, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois,* 405 U.S. 645, 656 (1972). See *Frontiero v. Richardson, supra,* and *Califano v. Goldfarb, supra.*[6]

The second purpose of Water and Power's Plan is to provide an incentive for qualified job applicants to choose employment with, and remain at, Water and Power. Thus, the Plan does not have its first practical effect when a participant becomes eligible to retire, but it begins to operate when he or she first accepts employment with Water and Power. The possibility that qualified male job applicants were encouraged to accept employment with, or dissuaded from leaving, Water and Power because of the differential treatment afforded them by the Pension Plan, at the very least, is speculative and remote.

Water and Power's claim that the use of non-gender based classification tables will result in male participants subsidizing female participants also is without merit. Because the death of each Plan participant occurs at a unique point in time, one participant is constantly subsidizing another participant. This is the nature of

---

[6]Water and Power abandoned its use of sex-segregated classification tables on December 23, 1974, shortly before the District Court's decision in this case. The proof is in the pudding. There is nothing in the record to indicate that the financial stability of Water and Power's Plan is being threatened, and from all outward appearances, the Plan seems to be running well.

a group plan. The subsidization factor, however, is demonstrable in group actuarial terms only, and the difference in treatment of the individual male under sex-segregated tables and non-sex-segregated tables is practically immeasurable.

Water and Power's Plan differs significantly from the disability plan considered by the Court in *Gilbert*. Unlike Water and Power's Plan, the plan in *Gilbert* was not discriminatory on its face, but merely excluded from its coverage disabilities associated with pregnancy which is "an objectively identifiable physical condition with unique characteristics." ..... U.S. at ....., 97 S.Ct. at 407. Thus, the Court emphasized that:

> " 'The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.' [*Geduldig v. Aiello,*] 417 U.S. at 496-497, n. 20." ..... U.S. at ....., 97 S.Ct. at 407.

Water and Power's Plan also divides potential recipients into two groups—men and women. This classification, however, is solely gender based. The first group is exclusively male and the second group is exclusively female. This is a far cry from the disability plan in *Gilbert* and it is just the kind of gender based classification that the Court struck down as unconstitutional in *Califano v. Goldfarb, supra* (invalidating social security statutes requiring a widower to have been dependent on his wife for at least one-half of his support in order to receive survivor's benefits, but allowing a widow to receive such benefits without regard to whether she may have been dependent on her husband for any part of her support); *Craig v. Boren, supra; Frontiero v. Richardson, supra* (invalidating federal statutes requiring a servicewoman's husband to be dependent on her for more than one-half of his support before she could receive certain benefits for him as a dependent, but allowing a serviceman to claim his wife as a dependent for such benefits without regard to whether she was dependent on him for any part of her support); and *Reed v. Reed, supra* (invalidating an Idaho statute providing that, when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female applicant). These cases cannot be distinguished from the case at bench, are controlling, and preclude any need for review.

B. Water and Power's Pension Plan Discriminated Against Women in Its Impact.

The Court in *Gilbert* recognized that in Title VII actions, unlike in actions based on the equal protection clause, "our cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another." ..... U.S. at ....., 97 S.Ct. at 408. (Emphasis in original.) On this basis, the Court concluded that General Electric's plan was merely *underinclusive,* that is, it did not cover all disabilities in the universe of disabilities, and did not impact more heavily on women than men:

"As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefit plan is less than all inclusive [footnote omitted]. For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially even handed *inclusion of risks*." ..... U.S. ....., 97 S.Ct. at 409-410. (Emphasis in original.)

Under Water and Power's Plan, each man and woman did not receive equal benefits measured in terms of per dollar contributions. Because women as a class are purported to live longer than men, all women were required to contribute 15 percent more to the Plan that their male counterparts. As the Court of Appeals pointed out, "[n]ot all women live longer than men, yet each individual woman is required to contribute more, not because she as an individual will live longer, but because the members of her sexual group, on the average, live longer." 553 F.2d at 585. In fact, although women as a class live longer than men, "the great majority of men and women—84 percent—share common death ages." *Henderson v. Oregon*, 405 F.Supp. 1271, 1277, appeal docketed, No. ....., 9th Cir. 1976. Thus, only about one women out of six outlives her male counterpart. The remaining five out of six women will die having contributed more

to Water and Power's Plan than their male counterparts, but having received the same benefits.

Another result of Water and Power's aggregate approach is that short-lived women are forced to bear the additional costs attributed to long-lived women. This result runs contrary to the well established rule that a practice which penalizes some women because of their sex is prohibited by Title VII regardless of whether the practice discriminates against all, or even most, women. *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971).[7]

Water and Power's Plan also can be distinguished from the disability plan in *Gilbert* in terms of risk coverage. As stated above, Water and Power's Plan provides participants with monthly checks typically used to satisfy short-term daily needs arising during retirement. The magnitude of these needs, and of the risks faced by retirees, do not correspond in any meaningful way with one sex or the other. See *Califano v. Goldfarb*, *supra*, and *Fontiero v. Richardson*, *supra*. Nevertheless, by providing equal retirement benefits to men at a lesser cost than to women, Water and Power gave men the opportunity to use this cost differential to purchase additional retirement insurance, and thus provided men with greater protection against the vicissitudes of retired life.

---

[7]In *Phillips*, the employer refused to accept employment applications from women with pre-school aged children, although it accepted applications from men with pre-school aged children. About three-fourths of the total job applicants were female, and about three-fourths of the new hirees were female, so that there was no evidence of discrimination against women as a class. Nevertheless, the Court held that Title VII prohibits an employer from maintaining one hiring policy for men and another for women. The Court stated that Title VII "requires that persons of like qualifications be given employment opportunities irrespective of sex." 400 U.S. at 544.

Water and Power's Plan differs from General Electric's disability plan in another important respect. The Plan is not voluntary, but is required under Los Angeles City Charter §220.1. Thus, the Court's analysis in footnote 17 of the *Gilbert* opinion, which hypothesizes a situation where the employer discontinues its disability insurance coverage and increases wages in an amount equal to the cost of the insurance, is inapposite.

The Interpretation of the Bennett Amendment in Gilbert Does Not Undermine the Judgment in Manhart.

While comparing Equal Employment Opportunity Commission ("EEOC") and Wage and Hour Administrator guidelines, the Court in *Gilbert* quoted Senator Humphrey as stating that the purpose of the Bennett Amendment to the Equal Pay Act (29 U.S.C. §206(d)) was to permit differences of treatment in industrial benefit plans, including earlier retirement options for women. Based on this remark, the Court applied an interpretative regulation issued by the Wage and Hour Administrator under the Equal Pay Act to undermine an EEOC interpretation of Title VII.[8]

The Court's deference to the Wage and Hour Administrator's interpretation of Title VII in *Gilbert* cannot help Water and Power in the case at bench. The fact is that the interpretation of Section 206(d) by

[8]Section 703(h) of Title VII provides that: "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if differentiation is authorized by the provisions of section 206(d) of Title 29." 42 U.S.C. §2000e-2(h). Section 206(d), among other things, permits discrimination based on "a differential based on any other factor other than sex."

the Wage and Hour Administrator is *consistent* with the interpretation of Title VII by the EEOC. Indeed, the Secretary of Labor filed an amicus curiae brief in this case before the Court of Appeals asserting that Section 206(d) does not protect Water and Power's classification scheme:

> "Clearly, the mere fact that the men and women are paid the 'same salary' (Appellant's br., p. 8) does not make their rates 'equal' for purposes of the Equal Pay Act if, as here, the 'take-home pay' of the women is less because of their larger compulsory contributions. It is well settled that payments made to satisfy the wage requirements set forth in Section [206] must be 'unconditional' —*i.e.*, they must be 'free and clear' [citation omitted] and the employee must actually have the use of the money [footnote omitted]." Brief of the Secretary of Labor, United States Department of Labor, as amicus curiae, at pages 9-10.

In any event, the Court's treatment of Senator Humphrey's remark, and its interpretation of the Bennett Amendment, was not essential to the decision in *Gilbert*, *i.e.*, that the exclusion of pregnancy disability coverage was not in itself discrimination based on sex. The remark was not even essential to the Court's rejection of the EEOC guideline. If the Court had considered Senator Humphrey's statement as controlling, its inquiry would have begun and ended with his opinion that Title VII does not apply to industrial benefit plans.[9] The Court of Appeal on reconsideration also did not

[9]But this is *not* the case. When Congress amended Title VII in 1972 to extend its protection to state and local government employees, the Conference Report on the 1972 Amend-

(This footnote is continued on next page)

change its decision after explicitly adopting the interpretation of the Bennett Amendment by the Court in *Gilbert*.

Conclusion.

> "The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." Chief Justice Taft in *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923).

Rule 19, Rules of the Supreme Court, sets forth some of the more important criteria considered by the Court in granting or denying certiorari. Rule 19 criteria relevant to this case are whether the Court of Appeals:

> (1) Has decided a federal question in a way in conflict with applicable decisions of the Supreme Court; or

ments stated that: "In any area where the new law does not address itself, or in areas where a specific contrary intention is not indicated, it was assumed that the present case law developed by the courts would continue to govern the applicability and construction of Title VII." Legislative History of the Equal Employment Opportunity Act of 1972, United States Senate (U.S. Government Printing office, Washington, D.C., 1972), at page 1844. Case law in 1972 included the 7th Circuit decision in *Bartmess v. Drewrys, U.S.A., Inc.*, 444 F.2d 1186 (7th Cir., 1971) and the District Court opinion in *Rosen v. Public Service Gas and Elec. Co.*, 477 F.2d 90 (3rd Cir., 1973), both holding, contrary to Senator Humphrey's interpretation, that the forced early retirement of women violated Title VII. Because Congress "has not just kept its silence" by refusing to adopt Senator Humphrey's opinion on the applicability of Title VII to industrial benefit plans, "but has ratified it with positive legislation," his remark ought to be ignored by the Court. *Red Lion Broadcasting Co., Inc. v. F.C.C.*, 395 U.S. 367, 381-382 (1969).

> (2) Has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision.

Defendants have not demonstrated that either of these criteria are present in the case at bench.

A. The Court of Appeals Decision Is Not in Conflict With Applicable Decisions of the Supreme Court.

Based on the above analysis, plaintiffs submit that the Court of Appeals decided this case in strict accord with the principles set forth by the Court in the *Gilbert* case.

First, Water and Power's Plan used actuarial tables to predict longevity of life which were based on one factor and one factor only—the sex of the Plan participant. Although women as a class may live longer than men, Water and Power ignored other more relevant longevity factors such as smoking and drinking habits, normality of weight, prior medical history, and family longevity history. There is no excuse for the administrative shortcut taken by Water and Power. Although this objective may have some importance, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois, supra.*

Moreover, unlike *General Electric*, Water and Power divided potential pensioners into two groups, one exclusively female and the other exclusively male. On the basis of this classification, it required women to contribute from their wages 15 percent more to the Plan than their male counterparts to receive equal benefits. This is the very type of discrimination based

on gender as such which the court struck down in *Califano v. Goldfarb, supra; Craig v. Boren, supra; Frontiero v. Richardson, supra;* and *Reed v. Reed, supra.* Not only did this classification bear no substantial relation to the purposes of Water and Power's Plan, but it discriminated against short-lived women contrary to the rule set forth in *Phillips v. Martin-Marietta, supra.*

Water and Power's Plan also discriminated against women in its impact. Unlike *General Electric,* Water and Power did not offer men and women an identical package. All women, regardless of their prior medical history and other factors affecting longevity of life, were required to contribute more to the Plan than men only to receive the same benefits. This practice permitted men to apply their greater take home pay toward additional retirement insurance and thus provided men with greater risk protection against problems encountered in retired life.

B. The Court of Appeals Has Not Departed From the Accepted Course of Judicial Proceedings as to Merit the Exercise of the Supreme Court's Supervision.

The Court of Appeals decided this case on November 25, 1976 in favor of plaintiffs. The Court's well-reasoned opinion was based on existing case law, administrative interpretations of the relevant statutes, and an extensive analysis of the legislative history underlying those statutes.

Two weeks later, on December 7, 1976, the Court decided the *Gilbert* case. Armed with this decision, defendants requested a rehearing *en banc.* In light of the *Gilbert* opinion, the Court of Appeals once again examined existing case law, administrative interpretations and legislative history. Once again, the Court of Appeals ruled in favor of plaintiffs.

Defendants have had three bites from the apple, including their hearing before the District Court. Now they are hungry for more. Plaintiffs submit, along with Chief Justice Taft, that the Supreme Court has more important matters to consider than to give the defeated party in the Court of Appeals another hearing. This is especially true in light of the fact that the California State Legislature, in Government Code §7500, outlawed Water and Power's use of sex-segregated classification tables effective January 1, 1975. Accordingly, plaintiffs respectfully request that defendants' Petition for Writ of Certioriari to the Ninth Circuit Court of Appeals be denied.

Dated: July 19, 1977.

Respectfully submitted,

KATHERINE STOLL BURNS,
ROBERT M. DOHRMANN,
HOWARD M. KNEE,
SCHWARTZ, STEINSAPIR, DOHRMANN & KREPACK,
By ROBERT M. DOHRMANN,
Attorneys for Respondents.

ORIGINAL

FILED
AUG 2 1977

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

PETITIONERS' REPLY BRIEF.

BURT PINES, *City Attorney,*

EDWARD C. FARRELL, *Chief Assistant City Attorney for Water and Power,*

J. DAVID HANSON, *Deputy City Attorney,*

DAVID J. OLIPHANT, *Deputy City Attorney,*

By DAVID J. OLIPHANT, *Deputy City Attorney,*

111 North Hope Street, P.O. Box 111,
Los Angeles, Calif. 90051,

Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

I — Page

Since Respondents Concede the Conflict Between This Case and General Electric Co. v. Gilbert, Petitioner Is Entitled to a Hearing by This Court 2

II

The Principles of General Electric, Dependent as They Are on Facts Akin to This Case, May Not Be "Distinguished" Without Overruling General Electric 5

III

In Failing to Make De Novo Determinations and Failing to Follow General Electric, the Lower Courts Departed From the Accepted Course of Judicial Proceedings, Exceeded Their Jurisdiction, and Denied Petitioners Due Process 8

IV

The Failure to Differentiate Upon the Basis of Other Characteristics Does Not Make Unlawful the Differentiation Upon the Basis of Sex Plus Age When the Payment Differential Is for Longevity and Not for Sex Alone 11

Conclusion 13

Appendix A. Letter to Cecil W. Marr, Esquire, Deputy City Attorney .....App. p. 1

Letter to The President The White House, Washington, D. C. 20500, Dated April 15, 1976 2

Letter to The President, The White House, Washington, D.C. 20500, Dated April 15, 1976 .. 3

TABLE OF AUTHORITIES CITED

Cases	Page
General Electric Co. v. Gilbert, ... U.S. ...., 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976)	2, 3, 4, passim
Henderson v. Oregon, 405 F.Supp. 1271	7
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	9
Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971)	13
Reed v. Reed, 404 U.S. 71 (1971)	12
Statutes	
California Government Code, Sec. 7500	6
United States Code, Title 42, Sec. 2000e-2	2
United States Constitution, Fifth Amendment	8
United States Constitution, Fourteenth Amendment	6

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

PETITIONERS' REPLY BRIEF.

I

Since Respondents Concede the Conflict Between This Case and General Electric Co. v. Gilbert, Petitioner Is Entitled to a Hearing by This Court.

Respondents concede that the opinion of the Court below is contrary to that of this Honorable Court in *General Electric Co. v. Gilbert*, ... U.S. ...., 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976). (R.B. 12-13.)[1] However, respondents ask this Court to "overrule" *sub silentio* the plain language of the statute (Bennett Amendment) and its own opinion in *General Electric*.

The difficulty with respondents' position is that the Supreme Court has interpreted the Bennett Amendment, has done so contrary to the court below in this case, and the Bennett Amendment is the controlling statute in this case.

Title VII prohibits certain unlawful employment practices which it carefully defines. The very same section states that it is *not* an unlawful employment practice to differentiate upon the basis of sex in payment of compensation. (42 U.S.C. §2000e-2.) It says:

> "It shall not be an unlawful employment practice . . . to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees . . .".

To assume as did the lower courts that there can be no differentiation upon the basis of sex contradicts the statute. No one can read so much of the statutory language and legitimately conclude that Title VII is a blanket prohibition against differentiation upon the

[1]Reference to "R.B. 1-2" etc. are to pages of the Respondents' Brief in Opposition to Petition for Writ of Certiorari.

basis of sex in payment of compensation. According to the statutory language such differentiation is not *ipso facto* an unlawful employment practice.

The above statutory language provides that differentiation upon the basis of sex in determining compensation is not unlawful discrimination *if* such differentiation is permitted by the Equal Pay Act.[2]

The Equal Pay Act in turn says it is not *ipso facto* unlawful to pay different compensation to one sex than the compensation paid to the opposite sex. Differential compensation is unlawful *only* if there is no other factor other than sex that is the basis for the payment differential.

Again, no one can read the language of the Equal Pay Act and conclude that it is *ipso facto* unlawful to differentiate upon the basis of sex in the payment of compensation.

To reach the opposite conclusion, one would also have to reject the statutory language in Title VII: "It shall not be an unlawful employment practice to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees . . . if authorized by [The Equal Pay Act]."

[2]Respondents wrongly argue that whether the "practice violated the Equal Pay Act is not at issue [sic] in this case" (R.B. p. 2 fn. 1). It is a *central* issue. Since Title VII declares it is *not* an unlawful employment practice to differentiate upon the basis of sex if authorized by the Equal Pay Act, the question whether the practice is prohibited or permitted by the Equal Pay Act is a central issue. *General Electric* explicitly recognizes that the Bennett Amendment incorporates the Equal Pay Act. It also recognizes that a major purpose of the Bennett Amendment is to permit differentiation upon the basis of sex with regard to retirement and disability plans.

This language expressly states that it is the intent of Title VII *and* the Equal Pay Act *not* to prohibit all differentiation in compensation based upon sex. The Randolph-Humphrey colloquy quoted in *General Electric* says precisely the same.[3] We have before shown that the legislative history as a whole compels the conclusion reached in *General Electric* and compels a result contrary to the result reached by the lower courts herein.

Here, the Department withholds from gross pay a pension contribution based upon age, sex, salary and length of service. This is not a determination based upon sex alone but on longevity. The Department makes a "differentiation upon the basis of sex in the payment of compensation" but the payment differential itself is for the factor of longevity and not for sex alone.[4] Hence, it is *not* an unlawful employment practice.

Respondents argue that even though there is a conflict (which they concede) between *General Electric* and the instant case that the decision in *General Electric* should now be ignored by this Honorable Court. This argument

---

[3]Respondent makes the unfounded argument that Senator Humphrey is supposed to have said that Title VII did not apply to industrial benefit plans. (R.B. 13.) What was said in the Randolph-Humphrey exchange (as this Honorable Court recognized), was that differential treatment or differential payments are permitted if the payment differential is for another factor other than sex (such as longevity) and not for sex alone.

[4]There is another reason why the decision herein is contrary to *General Electric*. The Plan also pays disability benefits, *including benefits for pregnancy*. If an employer can exclude pregnancy as *General Electric* holds, it follows that the total compensation package for males and females may be considered in determining whether the employer is unlawfully discriminating against women. The granting of summary judgment precluded determination of this issue also.

is an improper invitation to this Court to deliberately commit two fundamental errors.

First, it asks this Honorable Court to disregard the statute which it interpreted and applied in *General Electric*, which statute says that differentiation upon the basis of sex with regard to compensation is not *ipso facto* an unlawful employment practice.

Second, it urges in effect that this Honorable Court act improperly by totally disregarding its own controlling opinion without granting a hearing and addressing the question forthrightly. It argues in effect that this Honorable Court should not only acquiesce in the egregious errors below, but compound them. Such arguments require no further refutation than to baldly state them.

II

The Principles of General Electric, Dependent as They Are on Facts Akin to This Case, May Not Be "Distinguished" Without Overruling General Electric.

The respondents argue in effect that *General Electric* should be limited to its peculiar facts *sub silentio*. In making this argument, they recognize that the principles set forth therein are applicable to this case, and conflict with the lower courts' holdings herein.

To limit *General Electric* to its facts would be tantamount to overruling it. That case interprets the statute; it relies for such interpretation on fact situations virtually identical to the instant case. To refuse to apply those principles to the instant case, as the lower courts did herein, is tantamount to the lower courts "overruling" the decision of this Court.

Moreover, when the Supreme Court has relied on a Wage and Hour Administrator's bulletin as recognition of the fact that differential payment for longevity is proper, it is hardly appropriate for the lower court to rely on different bulletins to "overrule" the conclusion of the Supreme Court.

Furthermore, the facts in *General Electric* are not distinguishable in their basic concept. In *General Electric,* as in this case, the total compensation paid to women is not less than that paid to men. (R.B. 10, *General Electric, supra,* 50 L. Ed. 2d 343, 356 and footnotes 17 and 18.) The Court therein *also* noted that there was no proof that the package offered to men was in fact worth more than the package offered to women.[5] (R.B. 10, *General Electric, supra,* 50 L. Ed. 2d 343, 356.)

---

[5]Respondents wrongly state (R.B. 7, fn. 6) that "Water and Power abandoned its use of sex-segregated classification [sic] tables." Such have never been abandoned. On January 1, 1975 petitioners were required by California Government Code §7500 to *prospectively* lower the female contribution rate to that of the "equivalent" male. The validity of that statute is not before the Court. However, it appears to subject petitioners to potential liability to the males in that total compensation to males is thereby *not* the actuarial equivalent of total compensation to females. Thus, your petitioners are in the "no win" situation set forth in *General Electric, supra,* 50 L. Ed. 2d 343, 356 fn. 18. Furthermore, petitioners still pay retirement options and other retirement benefits under the Plan according to sex-differentiated actuarial tables. Respondents imply that because of the lowered contribution rate nothing remains to be resolved. However, the *final* judgment herein prohibits *past* as well as prospective differentiation in contribution rates, awards respondents substantial refunds of prior contributions, including interest and attorneys' fees, and provides potential authority for further refunds under remaining causes of action alleged pursuant to the 14th Amendment. On discrimination against males we also invite the Court's attention to the fact that the EEOC has said that it has "reasonable cause" to believe the Plan discriminates against males. (See EEOC "Decision" 75-147.)

Pension benefits are of course funded on a group basis. If, as indicated in *General Electric,* the employees purchased their own benefit plan on the open market, the women, instead of paying *slightly* more than the men as they do under the Plan, would have to pay *considerably* more for the same pension benefits as they receive under the Plan. This is shown by the fact that the Department contributes considerably more for female benefits than for males. In addition each employee has the option on resignation or retirement to recover all such employee's contributions.

The *stipulated* fact herein is that women as a class outlive men as a class. The total benefit package offered to females is actuarially equal to or greater than that offered to males.

Certainly, there are individual females who will not in fact live as long as the average female. So too are there males that will not live as long as the average male. But the life expectancy of each female is longer than each male. Actuarially, the short-lived male has a shorter life span than the short-lived female. For every woman who does not live as long as the group "females" there is a man who will not live as long as the group "males" or as long as his female "counterpart."[6] The *proper* comparison between a male

---

[6]Respondents at R.B. 10 cite *Henderson v. Oregon,* 405 F.Supp. 1271, 1275 fn. 5, for the misleading proposition that 84% of people share "common" death ages. Such conclusion was based on an unsubstantiated document, never subjected to cross-examination and inapplicable in the first place. The graph showed that commencing with retirement, at *every* age substantially more females survived than males. At age 83, 34,400 males remained and 51,200 females, to be provided with pension benefits. The Respondents' proposition has no meaning because it equates death at 65 with death at 100

(This footnote is continued on next page)

and his true "counterpart" shows the male will not live as long. The argument that *some* females will not live as long as the average female is specious, because such females will live longer than the corresponding males.

III

In Failing to Make De Novo Determinations and Failing to Follow General Electric, the Lower Courts Departed From the Accepted Course of Judicial Proceedings, Exceeded Their Jurisdiction, and Denied Petitioners Due Process.

We have before pointed out that administrative "bulletins" and "guidelines" which the lower courts treated as law, were issued *without* prior notice and public hearing. Hence even if they were regulations (which they are not) they could not be given effect by the courts without violating the Due Process clause of the 5th Amendment.

A fortiori, where Congress has intentionally withheld quasi-legislative and quasi-judicial authority from *both* the Wage and Hour Administrator *and* from the EEOC, the "guidelines" and "bulletins" of such agencies may not be given effect as if they were duly issued regulations without violating Due Process.

More than that, only Congress may create Article III courts and define their jurisdiction; and only Congress may delegate quasi-legislative and quasi-judicial authority to administrative agencies. Article III courts do not have the authority to delegate judicial power

---

when the *real* issue is funding benefits payable up to death at *each* age as such deaths occur. What is also significant is that your petitioners have not been given the opportunity to put on a case for the strength of their position actuarially.

to inferior tribunals; it follows *a fortiori* that such courts do not have authority to delegate quasi-legislative or quasi-judicial power to administrative agencies.

Hence the lower courts constitutionally may not, under the rubric of "deference" or otherwise, in effect *delegate* to the administrative agencies an authority other than whatever authority the Congress may have delegated to such agencies.

The law of Title VII absolutely requires that the trial court afford defendants a *de novo* determination on the question whether they have violated the statute. ". . . [C]ourt actions under Title VII are *de novo* proceedings. . . ." *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 799 (1973). This your petitioners were denied by the lower courts' "delegation/deference" to the administrative agencies, an act which not only was therefore a denial of due process but was also clearly in excess of jurisdiction of the Courts below.

The question whether defendants have "violated" a so-called regulation (*nee* guideline) is totally irrelevant since no bulletin or guideline is a regulation.

In *General Electric,* this Honorable Court plainly said that EEOC guidelines are not regulations. Respondents concede the conflict between *General Electric* and the instant case on this point when they say that *General Electric* "undermined" the EEOC's authority (R.B. 12). More properly stated, *General Electric* (a decision of the highest Court constituted by Article III) correctly held that the EEOC did not have the authority it has pretended to, by having its "guidelines" published in the Code of Federal Regulations, and by other acts.

Likewise, the fact that the EEOC issued a reasonable cause opinion (in an entirely different case) that a practice is unlawful, is of no more moment than a police officer's statement of what he considers "reasonable cause" to issue a warrant or make an arrest is relevant in a subsequent prosecution. Yet, the District Court relied on a "police officer's" statement when it cited EEOC Dec. 74-118 (Petition p. B-3).

The majority on rehearing relied on the "amicus" brief of the Secretary of Labor as "authority" for the proposition that there is no conflict between the administrative agencies. The respondents also rely on this "authority".

Under the Freedom of Information Act, however, your petitioners have finally obtained confirmation by the Justice Department that the conflict exists and that legislation is required to reach the result arrived at by the lower courts.

The letter to the President states:

> "The Labor Department interpretations under the Equal Pay Act . . . state that an employer is in compliance if it makes equal contributions to the retirement plan for similarly situated employees. EEOC, on the other hand, has taken the position . . . that the only way to comply with Title VII . . . is to provide equal periodic benefits." (See Appendix A).

Given the Labor Department's interpretation, it is absolutely untenable to assert that an employer may not differentiate on the basis of sex longevity because the interpretation above-quoted will necessarily result in unequal periodic benefits to males and females.

Further, the two administrative interpretations are in absolute conflict and can best be resolved by a reasonable compromise such as your petitioners' plan.

If an employer may contribute unequal amounts to pay equal periodic benefits, or equal periodic amounts to pay to the employees unequal periodic benefits, it is sophistry to hold (as the lower courts did) that employees may not be required to pay a larger proportion of the larger benefits which they receive in comparison to the other employees.

The conflict between the agencies is clear.

We also note that the federal government has failed to disclose the actuarial study of the estimated cost that this change in the law will bring about. They also did not disclose the memoranda of the background of the issues in this area. (See Appendix A.) As we pointed out in our petition the cost is horrendous.

IV

The Failure to Differentiate Upon the Basis of Other Characteristics Does Not Make Unlawful the Differentiation Upon the Basis of Sex Plus Age When the Payment Differential Is for Longevity and Not for Sex Alone.

The majority opinion of the Court of Appeals holds that actuarial tables which measure life expectancy as related to sex and age, are not sufficient to be acceptable under Title VII as a basis for differentiation in compensation between the sexes. The opinion infers that the failure to include a number of other characteristics which arguably may also affect longevity, such as smoking, drinking and obesity, makes such tables unacceptable.

Such reasoning is its own refutation. If sex plus age (*i.e.* longevity) can not be an "other factor other than sex" warranting a payment differential under the Bennett Amendment in and of itself, the addition of other characteristics will not make it so. The addition of other characteristics will not alter the underlying basic difference in life expectancy between males and females of the same age. It will only add other characteristics—sex neutral characteristics—on top of "differentiation upon the basis of sex." (42 U.S.C. §2000e-2.)

Either age plus sex-differentiated actuarial tables are permissible under the Bennett Amendment, or they are not. Either they constitute invidious discrimination or they do not. To hold that they might be acceptable if they also incorporate differentiation for smoking, drinking, obesity, and the like, is to acknowledge that such tables are acceptable.

The mere fact that your petitioners could have incorporated other characteristics affecting longevity does not mean that they must, nor does it invalidate the characteristics used.

This Honorable Court has recognized that women have a longer life expectancy than men (*Reed v. Reed,* 404 U.S. 71, 75 (1971)). The parties agreed below to that fact. In *General Electric,* this Court recognized the right of an employer to exclude employment benefits for a single disability, pregnancy, which impacted on one sex, females, without being in violation of Title VII. The fact that the employer might have excluded benefits for other disabilities did not invalidate the exclusion of benefits for the single condition, pregnancy. Similarly, the mere fact that there are other factors which may or may not affect longevity does

not invalidate the use of age plus sex related to longevity, alone. To hold to the contrary is to suggest that the Court in *General Electric* could permit exclusion of benefits for pregnancy under Title VII only if it found there was exclusion of benefits for a significant number of other disability conditions.

This case was decided on summary judgment. The only proven statistics before the Court are longevity as related to sex and age. If respondents can show that the other factors referred to are reliable, and longevity as related to sex is not, then the parties should proceed to trial.

Certainly, your petitioners could consider other factors. However, the question is not whether they may, but whether they must, particularly if trial would show that the only reliable factors are those proven by the Department.[6]

Conclusion.

Respondents accuse petitioners of having "three bites from the apple" and now being "hungry for more."

The tragedy is that your petitioners have yet to see the apple. They seek a de novo determination in a court on questions of law and of fact. The matter was decided on summary judgment in which the lower courts, contrary to their Constitutional duty to independently determine the law, de novo, "deferred" entirely to the administrative agencies for decision of the case. Not only did the Court of Appeals abdicate

---

[6]It is significant that in *Phillips v. Martin-Marietta Corp.,* 400 U.S. 542 (1971), the leading case cited by respondents, the Supreme Court still remanded the matter for trial requiring the employees to prove discrimination and allowing the employer to prove its practice lawful.

in favor of the administrative agencies, but it did so contrary to statute, Congressional history and the clear current expression of law of this Honorable Court in *General Electric*.

Respondents seem to suggest that due process has a numerical limitation. But due process includes the right to a fair hearing de novo which has so far been denied your petitioners.

Petitioners seek no more than that. As suggested by Judge Kilkenny on rehearing:

"set aside the judgment of the lower court and remand for a trial on the issue of whether the distinctions under the plan are mere pretexts designed to effect an invidious discrimination against members of the female sex."

We respectfully petition the court to grant Certiorari.

BURT PINES, *City Attorney*,
EDWARD C. FARRELL, *Chief Assistant City Attorney for Water and Power*,
J. DAVID HANSON, *Deputy City Attorney*,
DAVID J. OLIPHANT, *Deputy City Attorney*,
By DAVID J. OLIPHANT, *Deputy City Attorney*,
Attorneys for Petitioners.

APPENDIX "A".

Office of the Deputy Attorney General
Washington, D.C. 20530

Cecil W. Marr, Esquire
Deputy City Attorney
Office of City Attorney
City Hall East
Los Angeles, California 90012

Dear Mr. Marr:

You appealed from the denial by Deputy Assistant Attorney General James P. Turner, Civil Rights Division, of your request for access to certain records of the Department of Justice.

I am satisfied that the materials you seek are exempt from mandatory release pursuant to the provisions of 5 U. S. C. 552(b)(5). After careful consideration, however, I have decided to make these materials available to you as a matter of my discretion, having obtained the concurrence of the White House and having concluded that release will not be detrimental to the interests of the Department of Justice. One of the records being released to you, the report to the President from the Equal Employment Opportunity Coordinating Council, dated April 14, 1976, refers to certain enclosures in the closing paragraph. A search of all pertinent files has located only one of the mentioned enclosures, a preliminary draft of proposed legislation, which is being provided to you.

Sincerely,
Peter F. Flaherty
Deputy Attorney General
/s/ By: Quinlan J. Shea
Quinlan J. Shea, Jr., Director
Office of Privacy and Information Appeals

Enclosures

The Deputy Attorney General
Washington, D.C. 20530
April 15, 1976

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

As Chairman of the Equal Employment Opportunity Coordinating Council, I believe I owe you an explanation for the absence of one member agency's signature—that of the Equal Employment Opportunity Commission—on the attached letter to you from the Council.

This pension study, as you know, represents the combined efforts of six agencies, with differing jurisdictions and consequently differing outlooks on the pension issue. Achieving unanimous agreement on a common recommendation was no small task. Nevertheless, at our meeting on March 30 of this year, the Council reached unanimous agreement on the substance of its letter, subject to certain redrafting and expansion of details thereof and the preparation of a proposed draft bill. Agreement on the expanded letter and the proposed bill was achieved on or about April 13, 1976.

On April 14 and 15, however, the Equal Employment Opportunity Commission was unwilling to sign the letter, for reasons which would have required reopening the inter-agency discussions at this late date. As the April 15 deadline for this letter already represents the entire six months' time extension which you so graciously granted this Council, I chose not to recommence our efforts.

Respectfully,
/s/ Harold R. Tyler Jr.
Harold R. Tyler, Jr.

Attachment

The Deputy Attorney General
Washington, D.C. 20530
April 14, 1976

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

In response to your request, the Equal Employment Opportunity Coordinating Council has been working to develop a uniform approach to questions of law and policy regarding differentiation in retirement plan benefits on the basis of sex. The differentiation results from the use of sex-based actuarial tables. That is, when an employer makes equal contributions for men and women to a retirement benefit plan, female employees because of their longer average life span, receive lower periodic benefits than similarly situated men under a single life annuity.

The basic issue is whether employers who sponsor retirement benefit plans for their employees are required to provide equal periodic benefits to male and female employees at retirement. The Labor Department interpretations under the Equal Pay Act and Executive Order 11246, as amended, and the regulations of the Department of Health, Education, and Welfare under Title IX of the Education amendments of 1972 state that an employer is in compliance if it makes equal contributions to the retirement plan for similarly situated employees. EEOC, on the other hand, has taken

the position in its 1972 Guidelines on Discrimination in Employment Because of Sex and in court cases that the only way to comply with Title VII of the Civil Rights Act of 1964, as amended, is to provide equal periodic benefits.

All the member agencies of the Coordinating Council and HEW (which has been meeting with the Council on this issue) are agreed that it is a matter of sound public policy that periodic payments made to retired employees pursuant to the terms of employee benefit plans should not reflect a differentiation based on sex. This belief is grounded on the view that employees who have received equal pay and status during their working years ought to be assured of an equal income during retirement.

Because Congress has not made this position completely clear in existing statutes, the Council is recommending that you ask the Congress to enact legislation which would

—Require that all persons retiring on and after a date certain, *e.g.* January 1, 1980, under the terms of an employee retirement plan providing periodic benefits based on the employee's life receive periodic payments which do not reflect a differentiation based on sex.

—(EEOC believes that sound policy and the Congressional intent indicated in Title VII and ERISA mandate that an equal periodic payment requirement should also apply to survivors options and would want to request of the Office

of Management and Budget authorization to testify concerning its belief in this regard.)

—Require that if an employee retirement plan provides for retirement benefits in the form of a lump sum on and after the effective date, such lump sums shall be in amounts sufficient to purchase life annuities which provide periodic payments which do not vary because of the sex of the purchaser.

While the legislation is pending, EEOC will continue to process charges and implement its present perception of the law in court.

The Commission on Civil Rights believes that Title VII prohibits the current practice of paying unequal periodic benefits to men and women. The Commission believes that the current EEOC Guidelines can be fully justified by case law. The Commission sees no need for legislation. If, however, legislation is proposed, the Commission believes that Congress should consider mandating sex-neutral practices by the insurance industry, applicable to all forms of insurance.

We have enclosed for your consideration a preliminary draft of proposed legislation to implement our recommendation; a copy of a report prepared for the Council by actuaries who estimated the cost of the

proposed changes, and memoranda by the Solicitor of Labor and the Chairman of the EEOC setting forth the background of the issues in this area.

Sincerely,

/s/ Harold R. Tyler, Jr.
Harold R. Tyler, Jr.
Deputy Attorney General
and
Chairman, Equal Employment
Opportunity Coordinating
Council

/s/ W. J. Usery, Jr.
W. J. Usery, Jr.
Secretary of Labor

/s/ David Mathews
David Mathews
Secretary of Health, Education,
and Welfare

/s/ Arthur S. Flemming
Arthur S. Flemming
Chairman, Commission on Civil Rights

/s/ Robert E. Hampton
Robert E. Hampton
Chairman, Civil Service Commission

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

PETITIONERS' OPENING BRIEF.

BURT PINES, *City Attorney,*

EDWARD C. FARRELL, *Chief Assistant City Attorney for Water and Power,*

J. DAVID HANSON, *Deputy City Attorney,*

DAVID J. OLIPHANT, *Deputy City Attorney,*

By DAVID J. OLIPHANT, *Deputy City Attorney,*

111 North Hope Street, P.O. Box 111,
Los Angeles, Calif. 90051,

Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Constitutional Provisions, Statutes and Rules Involved 2

Questions Presented 3

Statement of the Case 3

Summary of Argument 8

Argument 10

I

It Is Not an Unlawful Employment Practice to Differentiate Between the Sexes With Respect to Deferred Compensation to Be Paid Under Pension Benefit Plans 10

The Statutes 10

Legislative History 12

1. The Equal Pay Act 13
2. Title VII 18
3. 1972 Legislative Action 22

Application of the Statutes 23

II

The Lower Courts Abdicated Their Responsibility to Render a De Novo Interpretation of the Law and Reached a Result Contrary to Statute 26

Page

Legislative Action and Intent 27
1. Equal Pay Act 27
2. Title VII and 1972 Amendments 30
3. Application 32

III

The Decision Below Is in Excess of the Court's Jurisdiction Under Article III and Contrary to the 10th, 11th and 14th Amendments to the Constitution 37

IV

The Decision of the Lower Court Is Contrary to General Electric v. Gilbert 46

Conclusion 49

Exhibit A. United States Constitution Article I, Sections 1 and 8 (Clauses 9 and 18) A-1

Article II, Section 3 .....A-1

Article III, Sections 1 and 2 .....A-1

Tenth Amendment A-3

Eleventh Amendment A-3

Fourteenth Amendment, Sections 1 and 5 .....A-3

Exhibit B. Fair Labor Standards—29 U.S.C. §206 .....B-1

42 U.S.C. §2000e-2. Unlawful Employment Practices B-2

42 U.S.C. §2000e-5(g) B-4

Page

Exhibit C. Legislative History of Acts C-1

I.

The Equal Pay Act C-1

II.

Title VII of Civil Rights Act C-5

III.

Administrative Interpretations of Law C-17

IV.

1972 Congressional Action C-23

V.

Legislative Intent vs. Interpretive Bulletin On Employer Costs C-28

Exhibit D. Charter Sections 220.1(1)(a) and (g) D-1

TABLE OF AUTHORITIES CITED

Cases — Page

Abbott v. City of San Diego, 165 Cal.App.2d 511, 332 P.2d 324 (1958) 5

Ammons v. Zia Co., 448 F.2d 116 (10th Cir. 1971) 14

Brown, In re Marriage of, 15 Cal.3d 838, 126 Cal. Rptr. 633 (1976) 5

Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. ...., 51 L.Ed.2d 270 (1977) 6

Corning Class Works v. Brennan, 417 U.S. 188, 41 L.Ed.2d 1, 94 S.Ct. 2223 (1974) 14, 28, 42

Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L. Ed.2d 397 (1976) 6

Dred Scott v. Sanford (1856) 19 How. 393, 15 L. Ed. 691 43

Edelman v. Jordan (1974) 415 U.S. 651 42

Gallentine v. Fiero, 110 Cal.App. 345, 294 Pac. 59 24

Garland M. Fitzpatrick v. Frederick Bitzer, 427 U.S. 445 (1976) 37, 42, 43

Geduldig v. Aiello (1974) 417 U.S. 484, 41 L.Ed. 2d 256, 94 S.Ct. 2485 .....6, 39

General Electric Co. v. Gilbert, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976) .....3, 7, 8, 9, 10 .....12, 21, 24, 25, 26, 27 .....29, 32, 34, 36, 39, 46, 47, 48, 49

Griggs v. Duke Power, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) 23, 33, 38

Page

Henderson v. Oregon, 405 F.Supp. 1275 (1975) 4

Henry v. City of Los Angeles, 201 Cal.App.2d 299 41

Houghton v. Long Beach, 164 Cal.App.2d 298 (1958) 41

International Brotherhood of Teamsters v. United States, et al., ... U.S. ...., 52 L.Ed.2d 396, 97 S.Ct. ...., 45 L.W. 4506 (May 31, 1977) 19, 38

Kahn v. Shevin (1974) 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1734 .....6, 39

Kober v. Westinghouse Electric Corporation, 480 F.2d 240 (3rd Cir. 1973) 41

Lauf v. E. G. Skinner & Co., 303 U.S. 323 (1938) 45

LeBlanc v. Southern Bell Tel. & Tel. Corp., 460 F.2d 1228 (5th Cir. 1972) 41

Manning v. General Motors Corp., 466 F.2d 812 (6th Cir. 1972) 41

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803) 42

McCardle, Ex Parte (U.S. 1869) 7 Wall. 506, 19 L.Ed. 264 .....44, 46

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) 23, 28, 30

National League of Cities v. Usery (1976) 426 U.S. 833, 49 L.Ed.2d 245 40

Reed v. Reed, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251 (197[illegible]) 24

Page

Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir.) 41

Schlesinger v. Ballard (1975) 419 U.S. 498, 42 L.Ed.2d 610, 95 S.Ct. 72 39

Schultz v. Wheaton Glass Company, 421 F.2d 259 (3d Cir. 1970) cert. den., 398 U.S. 905 ..... 14, 39, 40

Sheldon v. Sill (U.S. 1850) 8 How. 440, 12 L.Ed. 1147 ..... 44, 46

Skidmore et al. v. Swift & Co., 343 U.S. 134 (1944) 27, 29

Stanton v. Stanton, 421 U.S. 7, 95 S.Ct. 1373 (1975) 6

United States v. Stapf, 375 U.S. 118, 84 S.Ct. 248, 11 L.Ed.2d 195 (1963) 29

Washington v. Davis, 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976) 38

Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. 1975) 49

Miscellaneous

109 Congressional Record, p. 9195, 5/23/63 14

109 Congressional Record, pp. 9196, 9209, 2/23/63 13

109 Congressional Record, p. 9217, 5/23/63 17

109 Congressional Record, p. 9762, 5/28/63 18

110 Congressional Record, pp. 7218, 5803, 5437, 7477 45

Page

41 Federal Register, pp. 48484-48491 25

House Bill (H.R. 6060) 16, 17, 21

House Bill (H.R. 7152) 19

House Committee Report, U.S. Code, Cong. & Adm. News, 1972, pp. 2143-44, 2150-52 22

Population Estimates and Projections, Projections of the Population of the United States: 1977 to 2050, U.S. Department of Commerce Bureau of the Census, July 1977, p. 1 ..... 24, 25

United States Code, Cong. & Adm. News, 1972, p. 2168 31

Regulations

Code of Federal Regulations, Title 29, Sec. 2610 25

Code of Federal Regulations, Title 29, Sec. 2611 25

Statutes

California Government Code, Sec. 45342 41

Civil Rights Act of 1964, Title VII, Sec. 703 3

Civil Rights Act of 1964, Title VII, Sec. 703(a).. 2

Civil Rights Act of 1964, Title VII, Sec. 703(a)1 (42 U.S.C. §2000e-2(a)(1)) 10

Civil Rights Act of 1964, Title VII, Sec. 703(a)2 (42 U.S.C. §2000e-2(a)(2)) 10, 11, 38

Civil Rights Act of 1964, Title VII, Sec. 703(e).. 2

Civil Rights Act of 1964, Title VII, Sec. 703(h) (42 U.S.C. §2000e-2(h)) 2, 11, 20

Civil Rights Act of 1964, Title VII, Sec. 706(g).. 2

Page

Equal Employment Opportunity Act of 1972, 42 U.S.C. Sec. 2000e-2 .....3, 10, 12, 47, 48

Equal Employment Opportunity Act of 1972, 42 U.S.C. Sec. 2000e-2(a) 2

Equal Employment Opportunity Act of 1972, 42 U.S.C. Sec. 2000e-2(e) 2

Equal Employment Opportunity Act of 1972, 42 U.S.C. Sec. 2000e-5(g) 2

Equal Pay Act of 1963, Sec. 3 (Pub. L. 88-38, 77 Stat. 56) 2

Los Angeles City Charter, Sec. 220.1, California Stat. 1937, Chap. 3, Resolutions, p. 2627 41

Los Angeles City Charter, Sec. 220.1(1)(a) 2

Los Angeles City Charter, Sec. 220.1(1)(g) 2

United States Code, Title 26, Sec. 72(c)(3)(A), Regs. 1.72-9 25

United States Code, Title 26, Sec. 410 (IR[illegible]54) 25

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 29, Sec. 206(a)(1) 20

United States Code, Title 29, Sec. 206(d) 11

United States Code, Title 29, Sec. 206(d)(1) 2, 13, 42

United States Constitution, Art. I, Sec. 1 .....2, 42

United States Constitution, Art. I, Sec. 8 (Clause 18) 2

United States Constitution, Art. II, Sec. 3 .....2, 44

Page

United States Constitution, Art. III 44, 45

United States Constitution, Art. III, Sec. 1 .....2, 3, 9, 37, 42, 44, 50

United States Constitution, Fifth Amendment 37

United States Constitution, Tenth Amendment 2, 3, 9, 37, 40, 42, 43, 49, 50

United States Constitution, Eleventh Amendment 2, 3, 9, 37, 42, 43, 49, 50

United States Constitution, Fourteenth Amendment 2, 3, 9, 37, 39, 40, 42, 43, 45, 49, 50

United States Constitution, Fourteenth Amendment, Sec. 1 2

United States Constitution, Fourteenth Amendment, Sec. 5 .....2, 37, 39, 40, 44

Textbooks

Blumrosen, Administrative Creativity: The First Year of the Equal Employment Opportunity Commission, 38 Geo. Wash. L.R. 694 (1970) 33

Gerber, Joseph S., "The Economic and Actuarial Aspects of Selection and Classification," Forum, Vol. X, No. 4, Summer 1975 24

Jefferson, Thomas, Autobiography (Mod. Lib. Ed.), p. 21 22

Locke, John, Treatise on Civil Government 43

Roberts' Rules of Order (rev. ed.), p. 142 20

"Sex Differentials in Mortality Widening," Metropolitan Life Statistical Bulletin Vol. 52 (Dec. 1971), pp. 3-6 24

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

PETITIONERS' OPENING BRIEF.

Opinions Below.

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 553 F.2d 581 (9th Cir. 1976).

The decision and order granting preliminary injunction by the United States District Court for the Central District of California is reported at 387 F.Supp. 980

(C.D.Cal., 1975). The order granting summary judgment was issued without further opinion and is included in the Appendix, p. 134.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 23, 1976, and amended December 23, 1976. Petitioners' timely petition for rehearing was denied on April 18, 1977. Certiorari was granted October 3, 1977.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional Provisions, Statutes and Rules Involved.

Involved herein are Article I, Sections 1 and 8 (Clause 18), Article II, Section 3, Article III, Section 1, the 10th, 11th and Sections 1 and 5 of the 14th Amendment of the United States Constitution. The texts thereof are printed as Exhibit A[1] hereto. Section 3 of the Equal Pay Act of 1963 (Pub. L. 88-38, 77 Stat. 56), 29 U.S.C. §206(d)(1); and Sections 703(a)(e)(h) and 706(g) of Title VII of the Civil Rights Act of 1964, as amended in 1972 (the Equal Employment Opportunity Act of 1972), 42 U.S.C. §2000e-2(a), (e), (h) and §2000e-5(g). The texts thereof are printed as Exhibit B hereto. A summary of legislative history of the Equal Pay Act, Title VII of the Civil Rights Act of 1964 and the 1972 amendment is printed as Exhibit C. The Charter of the City of Los Angeles, a state law, §220.1(1)(a)(g) is printed as Exhibit D.

[1]Exhibits refer to attachments to this brief (hereafter Ex. ....). Appendix refers to separately filed Appendix (hereafter App. ....).

Questions Presented.

1. Where females receive the same monthly pension benefits as males, but for longer life expectancies than males, do Title VII and the Equal Pay Act prohibit different pension plan contributions for females and males?

2. Where Congress has not delegated to administrative agencies any quasi-legislative or quasi-judicial authority but has limited statutory jurisdiction to the courts with intent that the courts determine questions of law and fact *de novo,* may the courts abdicate that jurisdiction and defer to the pronouncements of the agencies, especially when the agencies' pronouncements are also shown on their face to be contrary to the expressed will of their principal, Congress?

3. May lower courts adopt a rule of law requiring a municipal employer to pay higher compensation to females than males in view of the jurisdictional limitations of Title VII, the Equal Pay Act, Article III and the 10th, 11th and 14th Amendments of the United States Constitution?

4. Is the decision of the courts below contrary to *General Electric Co. v. Gilbert?*

Statement of the Case.

This case was brought under Title VII of the Civil Rights Act as amended in 1972 (hereafter "Title VII"), claiming a violation of Section 703 of the Act (42 U.S.C. §2000e-2).

Plaintiffs are civil service employees of the City of Los Angeles Department of Water and Power and as such are members of a compulsory retirement Plan owned and managed by such City Department (here-

after referred to respectively as the "Plan" and the "Department").

The Plan provides for several kinds of pension benefits at the employee's option. The most common is a "formula pension". Such formula is a monthly payment equal to 2% of average monthly salary paid during the last year of employment times the number of years of employment. This monthly benefit is guaranteed for life. It is a vested right of the employee. Because women outlive men, the total amount paid as pension to a woman is greater than that paid to a man. (App. 86-88.)

For clarity, this Plan should be contrasted with those pension systems which pay men and women the same *total* pension benefits during their respective life spans, but pay women smaller monthly pension amounts. See, *e.g., Henderson v. Oregon,* 405 F.Supp. 1275 (1975), on appeal in the Ninth Circuit.

The two systems may be analogized to loaves of bread accrued at the date of retirement. In the *Henderson* system, women receive the same size loaf as men but because the life expectancy is longer, the monthly "slices" received by a woman are smaller than those received by a man. In contrast, under the Department's Plan, women are to receive the same size "slice" of bread each month after retirement but because they live longer they must have a longer loaf in order to pay all the "slices".

To fund the Plan, the employees and the Department contribute thereto. To fund the "longer loaf" payable to females, higher contributions are necessarily required for women than for men. Although contributions made by the women themselves were *slightly* higher than the contributions made by men, the Department also

contributed *disproportionately more* for women than for men.

Further, since each employee has an absolute right to the return of all his or her contributions, plus a vested pension right, the present worth of all compensation paid to female employees is higher than the present worth of all compensation paid to male employees.[2]

The following table shows an example of the present value at age 30 of pension benefits of a male and a female; and the present value of contributions necessary to fund a formula pension for each, retirement being at age 65.

	Male	*Female*
1. Age hire	30	30
2. Monthly salary during career	$1,000	$1,000
3. Monthly allowance at 65	700	700
4. Present Value of Pension discounted at 5½% interest and 1951 GA Mortality Table:	9,257	11,886
5. Monthly employee contribution to Plan	22.20 (x 1.1484 =	25.49
6. Department's 110% monthly matching contribution	24.42	28.04
7. Present value (at age 30) of contributions to fund above pension at 5½% and 1951 table:		
a) Member Contribution	4,069	4,743
b) Department's 110% matching	4,476	5,217
c) Additional Department contribution	712	1,926
d) Total Department contribution	5,188	7,143

The contributions by the Department for a woman employee were always greater than for a corresponding man. The amount of compensation for a woman was always greater than for a corresponding man.

---

[2]Established state law is that all pensions have present value and City pensions are vested rights. *In re Marriage of Brown,* 15 Cal.3d 838, 126 Cal.Rptr. 633 (1976); *Abbott v. City of San Diego,* 165 Cal.App.2d 511, 517, 332 P.2d 324 (1958).

The plaintiffs herein contended in the trial court that differential contributions by men and women were *per se* illegal. Despite the statutory language that "it shall not be an unlawful employment practice . . . to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid . . .," the trial court erroneously held that *all* differentiation upon the basis of sex was illegal.

> "In short, under the Equal Employment Opportunity Act of 1972, all stereotypic treatment of persons based on . . . sex *whether rational or irrational is dead*." (Emphasis added) 387 F.Supp. 980, 984.

(This Honorable Court has never held that differentiation on the basis of sex is *per se* illegal.)[3]

Based on this view of law, the District Court enjoined withholding larger contributions from females and ordered payment of prior "excess contributions" with interest to be paid to plaintiffs forthwith. The effect of this decision is to mandate the Department to compensate its female civil service employees at an even higher rate in comparison to males than it had previously done.

The primary basis for this decision was reliance on what the District Court viewed as "EEOC amended regulations" (App. 130 and 132).

The District Court subsequently entered summary judgment in accordance with the preliminary injunction opinion.

---

[3]*Kahn v. Shevin,* 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1734 (1974); *Stanton v. Stanton,* 421 U.S. 7, 95 S.Ct. 1373, 1377 (1975); *Geduldig v. Aiello,* 417 U.S. 484, 495, 41 L.Ed.2d 256, 94 S.Ct. 2485 (1974); *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Califano v. Goldfarb,* 430 U.S. 199, 97 S.Ct ...., 51 L.Ed.2d 270 (1977).

Your petitioners appealed contending that by relying on a 1972 EEOC "guideline" as if it were a regulation, the trial court failed to exercise its explicit statutory responsibility to impartially and independently interpret the law *de novo,* and that at all events the "guideline" was *ultra vires* and contrary to Title VII and the Equal Pay Act. Your petitioners contended that they had committed no unlawful employment practice as statutorily defined, and that the decision penalized the employer and discriminated against men, by requiring the employer to compensate women at a higher rate than men.

Similarly, your Petitioners contended that to attempt to lump males and females together as in a so-called "unisex table" would necessarily result in males' contributions subsidizing the females' benefits, and would consequently discriminate against males (see footnote 4, Court of Appeals Dissent, 553 F.2d 581, 598). It's like having men and women *appear* to contribute to equal size "loaves" but then taking part of the loaf of the shorter-living men, to pay "slices" to the longer-living women.[4]

The Court of Appeals repeated the errors of the trial court. Even when the *General Electric*[5] opinion was issued, a majority failed to recognize those errors.

By "deference" to administrative agencies the lower courts conferred on the agencies lawmaking powers that Congress specifically determined *not* to grant, which

---

[4]A "unisex" table would also adversely affect non-working women, wives of male employees. (App. 44). Since a high percentage of women are non-working, subsidizing of working women's benefits by the working males would adversely impact non-working wives of male employees.

[5]*General Electric Co. v. Gilbert,* 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976).

Congress specifically intended the agencies *not* exercise, and which this Court in *General Electric* said the agencies did *not* have. Your petitioners were thereby effectively deprived of an impartial *de novo* determination of issues of law and fact, which Congress specifically intended your petitioners be afforded by *independent* determination of the courts. Such ruling undermined the authority of this Honorable Court and nullified its holding and reasoning in *General Electric Co.*

The majority erred in failing to recognize (despite footnotes 17 and 18 in *General Electric)* that it is *not* an unlawful employment practice to differentiate upon the basis of sex in determining the amount of compensation to be paid if the differential payment is not prohibited by the Equal Pay Act.

The respondents take the position that no matter how great the difference in life expectancy, Title VII does not permit differentiation in periodic contributions and benefits.

Since such differentiation is not prohibited, we respectfully request this Honorable Court to direct the entry of judgment in favor of Petitioners.

Summary of Argument.

1. It is not an unlawful employment practice under Title VII and the Equal Pay Act to differentiate upon the basis of sex with respect to employee pension contributions or benefits based upon differential life expectancy. It is not a violation under the plain meaning of the statutes; under the legislative history; or under the law, as applied, in *General Electric Co. v. Gilbert.*

2. In order to hold against Petitioners, the lower courts relied on administrative interpretations of law issued without legislative authority. By such reliance, they abdicated their jurisdiction to determine the law independently *de novo.* After *General Electric v. Gilbert* the majority below relied for "authority" on its inability to "find a conflict" among the administrative interpretations. This case involves a question of law as to statutory interpretation to be decided solely by the courts and the "deference" below exceeded the statutory and constitutional jurisdiction of the courts and denied petitioners their right to *de novo* court determinations.
3. The application of a standard under Title VII and The Equal Pay Act broader than that contemplated by Title VII and The Equal Pay Act or by the Fourteenth Amendment, is contrary to Article III and the Tenth, Eleventh and Fourteenth Amendments to the Constitution.
4. The decision of the courts below was contrary to the opinion of the court in *General Electric,* in that (1) it failed to permit consideration of life expectancy as a factor other than sex upon which differential compensation could be paid; (2) it disallowed under the statute a benefit package which was concededly worth no more to men than to women; (3) it required the employer to pay more to women than to men; (4) it changed the definition of "discrimination" from that enacted in the statute to one permitting no differentiation between the sexes in compensation for any reason.

ARGUMENT.

I

IT IS NOT AN UNLAWFUL EMPLOYMENT PRACTICE TO DIFFERENTIATE BETWEEN THE SEXES WITH RESPECT TO DEFERRED COMPENSATION TO BE PAID UNDER PENSION BENEFIT PLANS.

The lower courts failed to give effect to the plain meaning of the statutes, the explicit legislative intent, and *General Electric Co. v. Gilbert*. The courts incorrectly held that no differentiation in compensation on the basis of sex was allowed by Title VII.

The Statutes.

Title VII prohibits certain unlawful employment practices which it carefully defines. The very same section states that it is not an unlawful employment practice to differentiate upon the basis of sex in payment of compensation. (42 U.S.C. §2000e-2.) It says, in part.

> "It shall not be an unlawful employment practice . . . to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees . . .". (Ex. B-3.)

To assume as did the lower courts that there can be no differentiation upon the basis of sex contradicts the statute. No one can read so much of the statutory language and legitimately conclude that Title VII is a blanket prohibition against differentiation upon the basis of sex with respect to compensation paid or to be paid. According to the statutory language such differentiation is not *ipso facto* an unlawful employment practice.

Whatever act may be listed as an unlawful employment practice in subsections (a)(1) and (2) of section

703, subsection (h) thereof expressly *excludes* from that definition, excludes from the sub-chapter, and exempts from the statutory prohibition any differentiation in compensation upon the basis of sex which is permitted by the Equal Pay Act. (42 U.S.C. §2000e-2(a) and (b)).

The Equal Pay Act in turn says it is not *ipso facto* unlawful *to pay different wages to one sex* than the wages paid to the opposite sex. Differential wages are unlawful *only* if there is no other factor other than sex that is the basis for the wage differential.

It provides in pertinent part:

> "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate which he pays to employees of the opposite sex . . . for equal work . . . except where such payment is made pursuant to . . . (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex* . . ." (29 U.S.C. §206(d).) (Ex. B-1.)

Again, no one can read the language of the Equal Pay Act and conclude that it is *ipso facto* unlawful to differentiate upon the basis of sex in the payment of compensation. Discrimination "*between* employees on the basis of sex" is not *ipso facto* discrimination *against* one or the other.

To reach the opposite conclusion, one would also have to reject the statutory language in Title VII: "It shall not be an unlawful employment practice to differentiate upon the basis of sex in determining

the amount of wages or compensation paid or to be paid to employees . . . if authorized by [The Equal Pay Act]." (Ex. B-3.)

This language is an explicit congressional declaration that Title VII incorporates the earlier act, its standards and policies—that differentiation on the basis of sex in payment of compensation is not *ipso facto* unlawful. *General Electric, supra,* p. 144.

The legislative history (see discussion, *infra*) demonstrates that even before that language was added to Title VII, the intent of Congress was that to differentiate on the basis of sex in the payment of compensation was not an unlawful employment practice *per se*. The above language was added to Section 703, for the purpose of expressing that intent of Congress as positive law.

In 1972, when Congress amended Title VII, it reaffirmed that *only* an adverse action statutorily defined as an "unlawful employment practice" is prohibited. Congress expressly reaffirmed the jurisdictional limitations, which had been added to the legislation in 1964, for the specific purpose of limiting remedies to that conduct which Congress defined as an "unlawful employment practice."

Legislative History.

This Honorable Court held in *General Electric* that differential fringe benefits were not prohibited by Title VII and the Equal Pay Act. The full legislative history only touched on by the Court compels such conclusion. It demonstrates that the employment practice involved herein is not an unlawful employment practice.

1. The Equal Pay Act.

The Equal Pay Act was based *first* on legislative recognition of the fact that the essence of personnel organization is classification of all work in a particular establishment into various classes of "jobs" (or in civil service, "positions"), *e.g.*, "clerks", "drivers", "Stenographers", etc., each of which classes has different tasks to perform, and each of which requires employee abilities or talents *correlative* to the tasks of each class respectively. (Ex. C-1.)

The legislative prohibition was directed to that precise business reality.

Many different forms of legislation for equal compensation were proposed. From among them, Congress chose to enact an amendment to the Fair Labor Standards Act. (Ex. C-1.) That Act was only intended to regulate wage rates. Thus, it states:

> "No employer . . . shall discriminate . . . between employees on the basis of sex by paying *wages . . . at a rate less than the rate* at which he pays *wages* to employees of the opposite sex . . ." (29 U.S.C. §206(d)(1)) (Emphasis added).

The prohibition was directed to paying unequal wages for work of the same class. Where there was another factor other than sex for the wage differential the prohibition did not lie.

Thus, in presenting the bill to the House it was repeatedly pointed out that under the bill an employer might have different classes of workers such as male packagers and female packagers and might pay them differently where there were actual factors of difference as the basis for different pay (109 C.R. 9196, 9209, 2/23/63). If male packagers were required to lift

heavy packages and female packagers were not, more compensation could be paid to the male packagers because of the actual differences between the two classes.

Merely *nominal* differences between the two classes (such as simply *calling* one "packagers" and the other "selectors" when there was no factor of difference between the two classes other than sex) would, of course, *not* authorize a difference in wages paid to the classes.

Similarly, an insignificant difference in the work between the two classes would not of itself authorize a difference in wages paid to each. However, under the prohibition of the Act, employers might continue differential payment based on differential classification when there was a good faith differential and the same was not a subterfuge to pay women less wages for the same work. Previous cases have so understood the Act. *Corning Glass Works v. Brennan,* 417 U.S. 188, 41 L.Ed.2d 1, 94 S.Ct. 2223 (1974); *Schultz v. Wheaton Glass Company,* 421 F.2d 259 (3d Cir. 1970) cert. den., 398 U.S. 905; *Ammons v. Zia Co.,* 448 F.2d 116 (10th Cir. 1971).

Both houses rejected the broad prohibitions and policies of the bill introduced by the administration (Ex. C-1) (109 C.R. 9195, 5/23/63). They did so in four ways: (i) by adding the legislation to the Fair Labor Standards Act and therefore prohibiting only differential wages; (ii) by narrowing the statutory prohibition to unequal wages paid for "equal" work instead of for "comparable" work; (iii) by limiting the authority of the administrator to that of a prosecutor, and (iv) by adding exceptions to the bill which were intended not

merely as "defenses" but which were "exempted from the operation by the statute". Such were consequently not prohibited and this made clear that sex *alone* was the consideration prohibited. The Committee report stated in part:

> "Section 2 of the bill (H.R. 6060) amends section 6 of the Fair Labor Standards Act by adding a new subsection thereto. This subsection, in effect, declares that wage differentials based *solely* on the sex of the employee are unfair labor standard. . . . Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that *any* of these exceptions shall be *exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included . . .*" (Emphasis added.) (Ex. C-2.)

As a matter of statutory construction, the broad general exclusion cannot mean factors *not correlated* with "maleness"/"femaleness". Where an employer is making different payments not *correlated* with a male/female classification the statutory prohibition would not apply in any event. It is only where an employer is making differential payments to male/female classes that the Equal Pay Act comes into play. Differential payments for a factor not correlated with "maleness"/"femaleness" is entirely outside the prohibition of the Equal Pay Act in any event. Thus, the intent of the statute is that where there is a factor of difference between the classes, such as "male packagers" lifting heavy boxes and "female packagers" not including that factor, differential wages may be paid to the two sexes.

If, on the other hand, every factor *correlated* with sex classification or with a differentiation based on sex were prohibited by the statute, then the broad general exclusion would have absolutely no meaning at all. Exception (iv) of the statute would become an "empty set" as no case would fall within it. To so interpret the exemption would turn it from "a broad general exclusion" (which Congress intended it to be) into a legal nullity. It would be tantamount to legislative repeal.

Congressional intent as to the scope of the fourth exemption was made clear by explicit history in both the Senate and House.

The Senate Committee bill contained a single exemption, identical to the fourth exemption of the House bill, H. R. 6060. The Senate Committee report declared that such exemption was intended to encompass not only the other three exceptions contained in the House bill, but other cost factors. Since some employers had testified that other costs in employing women (including costs of fringe benefit plans) were higher for women than for men, it was intended to provide that different *wages* might be paid on that ground. In other words, since some employers urged they should be able to pay lower *wages* to women for the same work because other costs in employing women were higher than for men, the Senate Committee report said that such cases would be covered by the fourth exception—where such differential costs existed, lower wages could be paid to women than to men for the same work under the legislation. (Ex. C-4.)

The major premise was, of course, that differential fringe benefits for men and women were not prohibited by the legislation.

An identical legislative intent is shown in the House. There Congressman Findley proposed to amend the pending bill (H. R. 6060) by adding a *fifth* exception to the bill. Such amendment would have, *inter alia,* permitted differential wages where other costs of employing women were greater (such as fringe benefit costs) than employing men to do the same work.

However, the House Committee members urged that the *purpose* of the proposed amendment (as Congressman Findley stated such purpose) was already covered by exception (iv) of the bill and a fifth exception was therefore unnecessary. Differential wages would be paid where other costs of employing women to do the same work were higher, as there would then be another factor other than sex for differential wages.

Thus it was stated with respect to Congressman Findley's proposal to add an *additional* exception (v), that it was redundant since it was already covered by exception (iv). Congressman Thompson (in charge of the bill) said "the language the gentleman [Mr. Findley] would add is redundant"; "the protection the gentleman [Mr. Findley] seeks already exists in the bill. I agree with the gentleman [Mr. Goodell who wrote the bill before the House] that the legislative history should show our intention". Then in direct answer to a direct question from Congressman Pucinski, the Chairman stated that "any other factor other than sex" covered what Congressman Findley was trying to do. (109 C.R. 9217, 5/23/63.)

Finally, after the House passed H. R. 6060, it struck the language of the Senate bill and substituted therefor the language of H. R. 6060. When both bills were then returned to the Senate, Senator Dirksen made

the point that he had spoken with those who would be conferees and "there is general agreement that the House language is quite preferable to the language contained in the Senate bill." (109 C.R. 9762, 5/28/63.) The Senate thereupon adopted the House bill with the *four* exemptions expressly stated.

Thus, the history in both Senate and House is clear that the purpose of the Equal Pay Act was not to prohibit all compensation differentials between the sexes but only such wage differentials where not based on another factor other than sex alone. Pay differentiation upon the basis of sex is prohibited if, but only if, there is no other factor other than sex that is the basis for the pay differential.

2. Title VII.

The face of Title VII as well as its legislative history conclusively demonstrates that although "sex" and "race or color" are treated by the same statute, Congress did not intend to, and did not, treat both matters in the same way.

Secondly, the face of the statute as well as the legislative history demonstrates that neither house of Congress intended to forbid all differentiation upon the basis of sex in determining the amount of compensation paid or to be paid. The 88th Congress which enacted The Equal Pay Act, was well aware of the inherently different problems involved in legislating in regard to sex discrimination, as compared with discrimination on account of race or color.

After it was proposed to add "sex" to Title VII of the Civil Rights bill, the one serious argument advanced in its favor was *not* that the two different

subjects should be treated in the same way but that adding "sex" was necessary to ensure the "color-blind" impact of the law *among women* in the labor market. Further, after the amendment was passed, "sex" was then added as a bona fide occupational qualification without objection of any member of the House. In contrast, the House explicitly rejected an amendment to make "race or color" a bona fide occupational qualification. (Ex. C-5-7.)

When the House Bill (H.R. 7152) reached the Senate there was extensive debate as to whether to refer the bill to Committee to clarify possible ambiguities in the bill. Possible conflict with the Equal Pay Act was specifically mentioned.

Interpretive Memoranda previously relied on by this Court[6] were then introduced to the effect (1) that classification by sex "where there is a rational basis" was *not* prohibited by Title VII; and (2) that the standards of the Equal Pay Act would be applicable in matters of compensation.

Because the House bill was not referred to a Senate committee, an *ad hoc* committee (Senators Dirksen, Humphrey, Clark, Case, *et al.*) met to consider all pending amendments and the views of those who desired to present them. The result of this *ad hoc* committee consideration was an amendment in the nature of a substitute bill (Amendment No. 1052) introduced by Senators Dirksen, Humphrey, and others. It provided that *three* of the Equal Pay Act exceptions would also be exceptions to the Title VII prohibitions—differentials based on a good faith merit system, quantity

---

[6]This Honorable Court relied on such Memoranda in *International Brotherhood of Teamsters v. United States, et al.*, ... U.S. ...., 52 L.Ed.2d 396, 424-425, 97 S.Ct. ...., 45 L.W. 4506, 4513 (May 31, 1977).

and quality of work or seniority system (42 U.S.C. §2000e-(h); A-3; 29 U.S.C. §206(a)(1); App. E-8).

The *fourth* exception to the Equal Pay Act which allowed differential compensation for any other factor other than sex and therefore simply prohibited differential compensation for sex only, was expressly adopted by the Bennett Amendment. The manner in which the amendment was adopted demonstrates the intent.

Prior to the introduction of the Dirksen-Humphrey substitute, Senator Dirksen yielded to Senator Bennett who proposed his amendment to the pending House Bill. Thereafter, both Senator Dirksen and Senator Humphrey expressly accepted the Bennett proposal as an amendment to *their* proposal. All three Senators explained the effect of accepting the Bennett Amendment. That intent was to provide, as a matter of law, and not merely as a matter of history, that the prohibitions of Title VII with respect to compensation of the sexes were *not* broader than the Equal Pay Act—that all the exemptions of the earlier act were exemptions to Title VII as well. (Ex. C-12.)

After the Bennett Amendment was accepted, the Senate then substituted the language of the Humphrey-Dirksen bill (as amended by the Bennett Amendment) for the language of the House Bill. Such bill was then the pending business and subject to amendment.[7]

---

[7]Proper procedure requires of course that an amendment in the nature of a substitute be voted on "twice". "Even if the [amending] paragraph consitutes the entire resolution and the motion to substitute is adopted, it is necessary then to vote on adopting the resolution as amended since it has only been voted to substitute one paragraph for another." Roberts' Rules of Order (rev. ed.), p. 142. This procedure protects the right of an individual to vote in favor of substituting the language of proposal "B" in preference to proposal "A", and then to vote against enacting "B" as law.

Senator Humphrey was then specifically asked "as floor manager of the bill" about the impact of the pending bill on retirement systems. Senator Randolph, who asked the question, had been co-author of the Senate subcommittee's equal pay bill which was identical to H.R. 6060. Senator Humphrey was the floor manager of the pending civil rights bill and also had presented the Senate Committee's equal pay bill. He also had expressly accepted the Bennett Amendment to clarify the effect of the Humphrey-Dirksen bill in regard to equal pay between the sexes. In answer to Senator Randolph's question, Senator Humphrey agreed that accepting the Bennett Amendment made it unmistakably clear that "*differences of treatment in industrial benefit plans,* including earlier retirement options for women, *may continue in operation under this bill* if it becomes law." (Emphasis added.) (See *General Electric, supra,* p. 144, 50 L.Ed.2d 343, 359.)

The express purpose for this colloquy was to plainly set forth Congressional intent as to the effect of the Bennett Amendment. (Ex. C-15-16.)

The House thereafter adopted the Senate bill. In so doing, it specifically recognized and affirmed the Senate intent. (Ex. C-16.)

Thus, the legislative history confirms that Congress carefully considered, and carefully drafted legislative language which would make clear that it is not an unlawful employment practice, to differentiate upon the basis of sex in determining the amount of compensation paid or to be paid as pension plan or other deferred compensation benefits. To differentiate upon the basis of sex where differential compensation paid or to be paid is based on the factor of life expectancy is not an unlawful employment practice under Title VII.

3. 1972 Legislative Action.

In 1972 Congress considered and rejected proposals to broaden Title VII. In rejecting such proposals, it also expressly reaffirmed major points of its 1964 action.[8]

The 1972 action is important for three reasons.

First, Congress reaffirmed that *only* those adverse actions that are statutorily defined as *unlawful employment practices* constitute unlawful discrimination under Title VII. In so doing, Congress rejected proposals to redefine discrimination in terms of "systems and effects" (House Committee Report, U.S. Code, Cong. & Adm. News, 1972, pp. 2143-44, 2150-52.)

Second, Congress rejected proposals to give the administrative agency any legal authority either to develop its own definition of discrimination, or to exercise *any* quasi-legislative or quasi-judicial authority. It also rejected the premise of the House Committee bill that the EEOC had special "expertise". (Ex. C-23-25.)

Third, it reaffirmed the requirement that court ordered remedies not apply unless the court find the employer has *"intentionally"* engaged in an unlawful employment practice as statutorily defined. (Ex. C-26.)

In 1964, each house of Congress had added limitations to the jurisdictional provision to make clear that they were not defining unlawful discrimination in any new or unusual way. The 1972 action reaffirmed that intent. Under the 1972 action, the courts could employ additional remedies if (but only if) an *unlawful employment practice* had been committed. Congress rejected the proposal that a new definition of unlawful discrim-

[8]"As the sentiments of men are known not only by what they receive, but what they reject also, I will state the form of the Declaration as originally reported." Thomas Jefferson, *Autobiography*, p. 21 (Mod. Lib. Ed.)

ination could be developed by the courts beyond that statutorily defined. (Ex. C-23-27.)

This most recent expression of legislative intent is controlling.

Application of the Statutes.

The Bennett Amendment and Congressional history demonstrate that Congress dealt with the problem of differential compensation based upon factors correlated with sex *differently* than Congress dealt with *other* classifications of employees, *Griggs v. Duke Power*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) or with discrimination against an individual employee, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

In contrast with both those cases, the present one involves classification or differentiation upon the basis of sex with respect to compensation paid or to be paid to persons in each class.

Here the Department withholds from gross salary a pension contribution based on age, sex, salary and length of service. This contribution, together with the entire pension plan benefit is deferred compensation.

The Bennett Amendment excludes from the definition of unlawful employment practice differentiating or classifying "upon the basis of sex in determining the amount of the wages *or compensation* paid or to be paid to employees" if such differentiation is permitted by the Equal Pay Act. Such Act authorizes what it does not prohibit.

In determining the amount of compensation paid or to be paid under that Act, the employer may pay less if other costs of employing women to do work of the same class is greater than for men. Since pension

costs for females are concededly greater than for males the employer could pay less wages or compensation in other forms. (Exs. C-3-4 and C-15-16.)

Furthermore, the employer may also differentiate upon the basis of sex with respect to compensation where the factor for which differential payment is made, though correlated with sex is a factor other than sex. Here the factor is life expectancy.

Given the recognized difference in life expectancies, it is impossible to have equal periodic pension benefits unless the females or the employer or both contribute more for the females, or unless the males subsidize the females. Certainly, the statute does not require the employer to pay women more than men, but only to refrain from paying women less where there is no rational basis for the wage differential. Longevity and the cost of funding for it are two distinct "other factors" specifically recognized by both houses as a basis for differentiation. (Ex. C-4-5.)

It is universally recognized that females as a group outlive males. (*General Electric v. Gilbert, supra* at 144; *Reed v. Reed,* 404 U.S. 71, 75, 30 L.Ed.2d 225, 92 S. Ct. 251 (1971); *Gallentine v. Fiero,* 110 Cal.App. 345, 346, 294 Pac. 59, 60). Plaintiffs' counsel conceded the fact. [Rptr. Tr. p. 36, October 24, 1974.] Nor is the fact changing. This is shown by the Department's own experience on which the Plan is based (App. 87) as well as general studies. ("Sex Differentials in Mortality Widening, "*Metropolitan Life Statistical Bulletin* Vol. 52, (December 1971) pp. 3-6; United States Census Bureau study cited in "The Economic and Actuarial Aspects of Selection and Classification" by Joseph S. Gerber, *Forum,* Vol. X, No. 4, Summer 1975; Population Estimates and Projections, *Projections of the Population of the United*

States: 1977 to 2050, U.S. Department of Commerce Bureau of the Census, July 1977, p. 1). Such data show that the difference is *widening* at a time when more and more women are entering the work force. The above cited July publication of the Bureau of the Census indicates a projected 9.2 year difference between males and females in life expectancy by the year 2050.

That Congress did not intend under the statutes to disregard the differences in life expectancy can also be concluded from the fact that Congress has continued to recognize the differences in other statutes dealing with pension benefits. The Internal Revenue Code, for example, continues to value male and female annuities differently for tax purposes (26 U.S.C. §72 (c)(3)(A), Regs. 1.72-9). The Employee Retirement Income Security Act of 1974, "ERISA", funding standards require actuarial soundness (26 U.S.C. (IRC 1954) §410 *et seq.*), and when enacted clearly contemplated use of sex-differentiated mortality tables. Indeed, the Pension Benefit Guaranty Corporation requires valuation of plan assets and benefits to be measured by six sex-differentiated mortality tables, 29 CFR 2610, 2611, 41 F.R. 48484-48491.

Finally, this Honorable Court in application of Title VII, 1) implicitly recognized that differential payment based upon longevity was payment for another factor other than sex which was permitted by Title VII (*General Electric, supra* at 144), and 2) that Title VII did not require an employer to contribute *more* for female employees than for males. (*General Electric, supra* p. 139 fn. 17).

This conclusion is confirmed by the legislative history of the 1972 amendments to Title VII.

There Congress *rejected* a proposal to authorize redefinition of unlawful discrimination in terms of "systems and effects". (Ex. C-24.) Here the "system" is classifying employees upon the basis of sex for pension purposes; the "effect" is that women employees as a class have *greater* deferred compensation in all forms and, with the *higher* employer contributions, considerably *higher* present economic worth.

The "systems and effects" are, however, irrelevant. The only question is whether an adverse action as statutorily defined has been committed. Since the Bennett amendment sanctions the practice here involved that question must be answered in the Department's favor.

II

THE LOWER COURTS ABDICATED THEIR RESPONSIBILITY TO RENDER A DE NOVO INTERPRETATION OF THE LAW AND REACHED A RESULT CONTRARY TO STATUTE.

In *General Electric,* it was urged that the Court defer to administrative interpretations of the statute and thus abdicate its own responsibility to determine the law. The Court declined to do so. It held the administrative pronouncements were not regulations and it would not abdicate its constitutional responsibility. (*Id.* at 145.)

The lower courts in the instant case did the opposite. They assumed incorrectly that the administrators had the power to make authoritative pronouncements on the meaning of the statute. By "deference" to such pronouncements the lower courts failed to exercise their responsibility to independently and impartially determine the law. After *General Electric,* such "deference" represents a failure to exercise its authority *under* the Supreme Court.

These circumstances, in light of clear Congressional provision and intent on the matter, require that the problem be explicitly addressed.

Legislative Action and Intent.

1. Equal Pay Act.

In enacting the Equal Pay Act, Congress established the Administrator as a prosecutor. In so doing, Congress was well ware of *Skidmore, et al. v. Swift & Co.,* 343 U.S. 134 (1944) interpreting the Fair Labor Standards Act. In that case, the Court had addressed the question whether a particular industry-wide practice constituted "overtime" in that industry. The Court held that the Administrator's experience in the practices of that industry constituted a body of experience as to matters of *fact* upon which the *fact-finder* might properly rely.

The Court carefully noted that it was a matter of *fact* being considered. Regarding administrative bulletins, the Court pointedly observed "they do *not* constitute an interpretation of the Act. . . ." 343 U.S. at 139. (Emphasis added). Rather, they were in the nature of expert testimony or opinion based on wide and specialized experience in matters of *fact* in an industry.

Under the Equal Pay Act, however, the legislative history demonstrates that Congress intended that the *bona fide* judgments of the employer as to work classifications *in a particular establishment* not be displaced by claimed superior expertise of the administrator

as to industry-wide practice as to the most appropriate manner to classify the work in that establishment.

The prosecutor had the burden of proof as to the propriety of a classification made in a given case. (Ex. C-18-19.) Thus, where the prosecutor showed that an employer made a classification of work (day shift/night shift) but then abandoned differential payment for that time factor, the Court held there was no factor other than sex shown for the previous wage differential but it was solely because of sex.[9] *Corning Glass Works v. Brennan,* 417 U.S. 188 (1974).

With respect to matters of law, Congress was even more explicit. Congress purposely *withheld* from the Administrator all authority to issue regulations. (Ex. C-18-19.)

Congress noted that there are three levels of pronouncements which an administrator might direct *to the public*: 1) legislative regulations, 2) interpretive regulations, and 3) bulletins. Congress noted that the Administrator might issue bulletins, not because of any delegation of power from Congress, but rather because of inherent authority in *any* prosecutor to advise *the public* of the cases he will prosecute.

However, Congress intended that the bulletins not be given any standing in court *except as a defense* where relied upon by the defendant. It was not to be used against a defendant. It might be a *shield*

[9]Where *prima facie* equality as to all factors except payment to the sexes is shown, the defendant has the burden of *producing* evidence that another factor other than sex is the basis for the differential payment; the prosecutor retains the burden of proof and persuasion that it is because of sex alone. *Cf. McDonnell Douglas v. Green, supra.* (See Ex. C-18-19.)

but it was not to be a policy making sword. (Ex. C-19-20.)

It is well established that the weight (if any) "to be given to interpretive rule varies with its statutory and administrative context. . . ." *United States v. Stapf,* 375 U.S. 118, 127 n. 11, 84 S.Ct. 248, 255, 11 L.Ed.2d 195 (1963). Here Congress intended that bulletins be given no weight in the scales of justice *against* a defendant, but only in defendant's favor. (Ex. C-18-21.)

Similarly, in *General Electric v. Gilbert, supra,* p. 144 this Court cited bulletins of the Administrator not as being correct interpretations of the statute that the administrator had authority to issue and a court might therefore follow. Rather, they were cited as administrative recognition of a *fact*—a factor of difference between the sexes—that life expectancy in females is greater than in males (which Congress intended be recognized under the law). Moreover, the Court cited those bulletins to hold in *favor* of defendant, not to hold against it.

Even if there were no Congressional history, *Skidmore, et al. v. Swift & Co.* does not authorize deference to bulletins as interpretations of the statute, or the meaning of law. Hence, for the lower courts to have concluded as they did that bulletins and guidelines are "entitled" to deference as interpretations of law against a defendant constitutes either a delegation or an abdication of judicial power. To say (as the lower courts did) that they are "regulations" binding on the defendant and the Court, is an even greater error. It denies defendant the right to an impartial and independent *de novo* determination that Congress intended the defendant be afforded by the Court under the statutes.

2. Title VII and 1972 Amendments.

In considering equal pay legislation, a major concern was to draft legislation that would not make government the determiner of proper employment standards and practices generally. That same general concern was manifest under Title VII.

The bill originally proposed had provided that the EEOC was to have both quasi-legislative and quasi-judicial authority. Both were stricken from the bill. Instead, the House determined that EEOC was to act as prosecutor—the same administrative pattern as set up under the equal pay bill. (Ex. C-21.)

The House pointedly added the word "procedural" to the EEOC's authority to issue *procedural* regulations. On record keeping and procedural regulations, EEOC was to comply with usual requirements of notice and opportunity to be heard. (Ex. C-21-22.)

The EEOC was authorized to bring suit on "reasonable cause"—a phrase which was intended to make very clear that EEOC had no authority to make, and would not make, *any* determination on ultimate issues of law or fact. Such are to be determined by the Court *de novo*. *McDonnell Douglas v. Green, supra.*

An EEOC's decision is like a policeman's decision to make an arrest. Since the statute says EEOC can act on "reasonable cause", it follows that the court may *not* regard an EEOC decision to act as a finding of ultimate fact or conclusion of law to which the Court may defer.

In 1964, the Senate further limited the EEOC to the role of a conciliation agency, to attempt conciliation

as a condition precedent to an individual bringing suit in a federal court. Consistent with the legislative intent that the Act impose no new burdens in States having FEPC laws, Congress intended that the conciliation process also be attempted as a prerequisite to filing suit, through State agencies.

In 1972, Congress enlarged the EEOC authority from a conciliation agency to a prosecutor. In so doing, both houses of Congress again rejected proposals to delegate quasi-legislative or quasi-judicial authority to the agency. A major reason for so doing was the view that the agency is an advocate, a partisan of a viewpoint, and that the defendant should receive an *impartial* determination *de novo*. (Ex. C-24-27.)

The view which prevailed in the 1972 legislation was expressed by the minority of the House Committee in the following terms:

> "We contend that the EEOC has attained an image as an advocate of civil rights, and properly so. For this very reason, we submit that it cannot be an impartial arbiter of the law. An advocate, by nature, represents one side of an issue. How can he then be asked to apply the law without prejudice?" (U.S. Code, Cong. & Adm. News, 1972, p. 2168.)

The same objection goes to a prosecutor's extra-judicial pronouncements as to the meaning of a law. If an advocate's interpretations are afforded *a priori*, "greater weight" the defendant is not afforded an impartial determination of the law.

3. Application.

There are three major problems with respect to administrative pronouncements raised herein.

First is the matter of administrative faithfulness to the will of the principal. It is basic to constitutional government that the executive branch is to "take Care that the Laws be faithfully executed." (U.S. Const. Art. II, Sect. 3, Ex. A-1.) A similar principle exists in the law of agency—that the agent (the administrator) is to be faithful to the will of its principal (Congress).

The problem is twofold. First, where the agent has not been granted authority to speak for the principal, he exceeds the authority of his agency by purporting to act with authority to speak for the principal. Thus, where the Secretary of Labor purports to have authority to speak for Congress in executing the law—to issue authoritative pronouncements as to the intent of the statute, the Secretary is acting outside both the authority of his agency and the explicit Constitutional limitations upon the executive branch. Likewise, EEOC so acts outside its agency when it pretends to have authority to speak for Congress on the meaning of law when Congress has not given it that authority.

Here, for example, bulletins and guidelines have been published in the Code of Federal Regulations as if they were regulations. They were referred to, and relied on, as regulations by the lower courts in the instant case even though the defendant/petitioners repeatedly urged they did not have such status and this Court in *General Electric* so held. "Reasonable cause" decisions of the EEOC were likewise relied upon as though they were authoritative interpretations pursuant to a Congressional grant of authority. The fact that

the EEOC not only does not have such authority but also determined to give its pronouncements the *ostensible* appearance of authority looking for reliance thereon by "busy federal judges" is well documented. Blumrosen, *Administrative Creativity: The First Year of the Equal Employment Opportunity Commission*, 38 Geo. Wash. L.R. 694 (1970). (C-22.)

As a matter of additional importance, it is significant that the earliest EEOC testing guidelines in 1966 were simply a statement of what the EEOC "advocates" and "recommends". This was the earliest administrative interpretation by the agency of the scope of its own authority. It was only after certiorari was granted in *Griggs v. Duke Power Co., supra,* that EEOC without notice published new testing guidelines in a format that made them appear as regulations.

The problem herein is not only a matter of the administrative agency acting outside its grant of authority, it also results in 1) a failure of the judiciary properly to exercise its jurisdiction and 2) a denial of defendants' rights.

If, for example, the agencies did have authority to issue substantive regulations or make quasi-judicial determinations, the defendants would be entitled to notice and opportunity to be heard. If they had been pronounced without such due process minimums, the court would disregard them. However, here the bulletins and guidelines (which are *not* on matters of fact based

on industry-wide expertise but are interpretations of law) were issued without either notice or opportunity to be heard.

Nevertheless, the lower courts treated them as if they were to be "deferred to" even above the decision of this Honorable Court in *General Electric v. Gilbert*. They treated them as if such administrative pronouncements were not merely to "guide the public" as to the administrator's views, but were to "guide *the courts*" and "guide" the courts even ahead of the judgments of the only Court established by the Constitution itself. This makes the courts simply the arm of the administrator. They treated the pronouncements not merely as the administrator's views with no standing in court against defendant (as Congress intended) but rather as conclusive determinations of matters of law. Even regulations and quasi-judicial decisions of agencies that have been duly delegated such authority are not entitled to such "weight". In such cases a defendant may challenge a regulation as being *ultra vires*. Of course where that issue is raised the regulation is not itself the measure of the meaning of the statute. Similarly, a quasi-judicial determination is only presumptively correct, as to matters of fact. The defendant in such cases is entitled to judicial review on matters of law and to rebut the presumption on adverse findings of fact.

Here, however, the courts treated the administrative pronouncements (which were also in content directly contrary to the statute they purported to "interpret") as if they were above the statute, and the agent above the will of the principal.

Thus, even if the Secretary of Labor or the EEOC issued a bulletin or guideline that they were going

to prosecute pension plans requiring differential contributions such pronouncements would be entitled to no standing in court against a defendant, as a matter of legislative intent. (Ex. C-19.)

The question is not whether a defendant "violated" any such pronouncement. The question is whether the practice is an uniawful employment practice as *defined by statute*. And on that issue the administrative pronouncements are entitled to no weight, except as relied on by a defendant in his defense.

To hold otherwise is to hold that the agent may bootstrap itself into authority not granted by its principal. Such "deference" renders the administrator prosecutor, judge and jury without ever appearing in the case.

The practice is doubly wrong here. Here the administration sought in 1972 to have the Legislature redefine "discrimination" (or to permit the EEOC or the courts to do so) and to have the Legislature delegate quasi-legislative and quasi-judicial authority to it.

Having failed in the Legislature, the EEOC then issued new "guidelines" post-1972 and sought as an "amicus" in both courts in the instant case to have the *courts* adopt those new interpretations as defining prohibited conduct under the statute and "recognize" the EEOC as having quasi-legislative and quasi-judicial authority.

The success of this improper action by the EEOC is shown by the fact that the District Court made an express finding that the EEOC "amended its regulations" in 1972, and the District Court based its judgment on such "amended regulations." (App. 130 and 132.)

The EEOC had similar success in the Court of Appeals. While this Court explicitly pointed out in *General Electric* that "guidelines" are *not* regulations, even the Dissenting Opinion referred to them as "regulations." (553 F.2d 598.)

The second, analogous matter, concerns the agents' faithfulness to the will of principal in matters of the laws' content. Where the agent purports to have authority to speak for the principal, others may mistakenly take the agents' pronouncements as being in *content*, a faithful representation of the will of the principal. The courts erroneously so took them here.

Thus, while the statute states that it shall not be an unlawful employment practice to differentiate upon the basis of sex in payment of compensation, yet the courts below concluded (relying on administrative pronouncements) that the *purpose* of the statute was the direct opposite, namely, to prohibit all such differentiation. (C-28-29.)

The majority Court of Appeals initially found "conflicts" among the administrative pronouncements in its original opinion, as did this Court in *General Electric v. Gilbert*. On rehearing the majority below could "find" no conflict.

Searching for "conflicts" among administrative pronouncements entirely diverted the court from the primary issue before it and from its constitutional and statutory responsibility—to determine the meaning of the *statute*.

The issue is not whether the employment practice is condoned or condemned by administrative pronouncements or briefs filed by the administrator (who is an advocate or partisan even when appearing as "amicus"). The issue is rather whether the statute itself prohibits a practice in question.

Viewing the statute through the "glasses of interpretation" provided by the administrator substitutes different statutory prohibition for the one expressed by Congress. (Ex. C-28-29.)

The jurisdictional limitations of Title VII contemplate that the courts give effect to the statute both in respect to what conduct Congress prohibited and in respect to the *absence* of quasi-legislative and quasi-judicial authority in the agency. For the lower courts to have disregarded the Congressional will and intent on either point is to act outside their own jurisdiction as expressly limited by the statute. It also denies to the Petitioners that right to an *impartial* determination of issues that both the Constitution *and* the statutes guarantee. As to your individual petitioners it is a denial of due process of law guaranteed by the Fifth Amendment.

III

THE DECISION BELOW IS IN EXCESS OF THE COURT'S JURISDICTION UNDER ARTICLE III AND CONTRARY TO THE 10TH, 11TH AND 14TH AMENDMENTS TO THE CONSTITUTION.

The decision of the lower courts—requiring an irrational classification with respect to compensation—exceeded Article III and the 14th, 10th, and 11th Amendments to the Constitution.

The 1972 Amendments to Title VII were enacted by Congress under §5 of the Fourteenth Amendment which empowers Congress to enforce that amendment by appropriate legislation. (*Garland M. Fitzpatrick v. Frederick Bitzer*, 427 U.S. 445 (1976).) *Ergo*, legislation adopted by the Congress pursuant to the Fourteenth Amendment must be tested by Fourteenth Amendment standards.

Two results follow. First, the statute could not provide for a violation without the requirement that the employer have a discriminatory purpose. (*Washington v. Davis*, 426 U.S. 229, 245, 48 L.Ed.2d 597, 610-611, 96 S.Ct. 2040 (1976).)

The legislative history makes it plain that this was in fact what Congress had in mind when it adopted both Title VII and the Equal Pay Act. Good faith classifications were to be permitted. The requirement of "intent" on the part of the employer was specifically added to Title VII and this was reaffirmed by the 1972 legislation. (Ex. C-26-27.)

Where the classification itself is not rational or *bona fide*, the employer's personal subjective intent as to the *means* to perpetuate or accomplish that classification[10] is irrelevant. *Griggs v. Duke Power, supra.*

On the other hand, where the classification is rational or *bona fide* there is no unlawful practice unless unlawful intent is shown. *Teamsters v. United States, supra,* ..... U.S. ....., 52 L.Ed.2d 396, 432 fn. 50.

Second, the concept that *all* differentiation based upon sex with respect to compensation is illegal was

[10]In *Griggs v. Duke Power* the Court treated the employment practice as one of "classification" covered by Section 703(a)(2). The work (and workers) had been classified as "laborers" and "coal handlers", but this was merely a difference in name only, and not based on actual differences in the work of the "classes" or correlative abilities demanded thereby. If the standards regarding work classification intended by the Equal Pay Act were applied to the facts, the classification would be not rational or *bona fide*. The use of a written test by the employer as a means of perpetuating such classification does not change the problem or alter the conclusion. *Every* employment standard and its application is a "test" to classify employees or applicants for some purpose. Where as in *Griggs*, the particular "test" is employed to perpetuate or accomplish an arbitrary, artificial and unnecessary classification ("laborer"/"coal handler") that tends to adversely affect the employment status of a "laborer" because of race, a violation is shown as the Court held.

clearly never a part of equal protection under the Fourteenth Amendment. Rational classification is the standard and this is the standard Congress adopted. Such rational classification was expected under the Equal Pay Act and Title VII. Factors such as seniority, merit, quality and quantity of work were obvious bases for rational classification and were so recognized in the statute and legislative history.

So, too, sex itself was recognized as a rational classification with respect to compensation where another correlated factor was the basis for the pay differential. Similarly, sex is a rational classification where the factor is an occupational qualification *bona fide.*

The 1972 amendments reaffirmed the 1964 definition of unlawful "discrimination." (Ex. C-24-26.)

The fact that Congress did not intend exceeding standards of the Fourteenth Amendment was recognized by this Court in *General Electric*. "We should not readily infer that it meant something different than what the concept of discrimination has traditionally meant, . . ." (*General Electric, supra,* 429 U.S. 145, 50 L.Ed.2d 343, 360.) This conclusion is supported by additional legislative history not quoted in the Court's opinion.

The Honorable Court has construed the Due Process and Equal Protection provisions as not prohibiting classifications such as defendants' Plan where there is a rational basis therefor. *Kahn v. Shevin* (1974) 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1734; *Schlesinger v. Ballard* (1975) 419 U.S. 498, 42 L.Ed.2d 610, 95 S.Ct. 72; *Geduldig v. Aiello* (1974) 417 U.S. 484, 41 L.Ed.2d 256, 94 S.Ct. 2485.

Similarly the statute on its face and its legislative history show that a classification related to sex "where

there is a rational basis" (Ex. C-1-4) is *not* prohibited unless the plaintiffs show such is not in good faith or is a subterfuge. See *Schultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970), *cert. den.* 398 U.S. 905. The Dissent below so concluded.

It cannot be supposed that Congress is empowered by Section 5 of the 14th Amendment to enact legislation *prohibiting* classifications that are *permitted* by the 14th Amendment. Hence if Congress had enacted a law prohibiting rational classifications or requiring irrational ones, it would be acting in excess of its 14th Amendment power.

Consequently, assuming *arguendo* that the trial court was correct that even "rational" classification is prohibited (and irrational classification therefore required) by Title VII, it would follow necessarily that to that extent Congress acted in excess of its 14th Amendment power.

Such exercise of power would therefore have to be sustained, if at all, under some other grant of power—the commerce clause, for example.

But this Honorable Court has held that the Tenth Amendment is a limitation on the exercise of the commerce clause power in respect to cities. Such amendment provides that powers not delegated to the United States are reserved to the States, and the authority of Congress to regulate in a manner which invades local sovereignty is limited thereby.

Thus this Honorable Court has held that Congress may not regulate compensation of civil service employees. The court stated in *National League of Cities v. Usery* (1976) 426 U.S. 833, 49 L.Ed.2d 245, 253:

> "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the *matter*, but because the Constitution prohibits it from exercising the authority in that *manner*." (Emphasis added.)

Management of the City Department's retirement plan is likewise a function of local government under state law (Charter §220.1, California Stat. 1937, Chap. 3, Resolutions, p. 2627). (Ex. D-1.) The City Charter Section 220.1, and similarly, California Government Code Section 45342, require that the Plan be maintained on a sound actuarial basis. Requiring refunds of previous contributions prior to retirement interferes with actuarial soundness in a manner not required by equal protection or due process.[11]

Further, despite the majority Opinion below that the Department could pass on the cost of refunds by increasing all contributions or lessening benefits, such is not permitted by State law or by the Equal Pay Act. (State Law) *Houghton v. Long Beach*, 164 Cal.App.2d 298, 306 (1958); *Henry v. City of Los Angeles*, 201 Cal.App.2d 299, 314; (Equal

---

[11]Even where there may be an unlawful employment practice an award of back pay is to be denied where the practice was in reliance on state law. *Kober v. Westinghouse Electric Corporation*, 480 F.2d 240, 248 (3rd Cir. 1973); *LeBlanc v. Southern Bell Tel. & Tel. Corp.*, 460 F.2d 1228 (5th Cir. 1972); *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1227 (9th Cir.); *Manning v. General Motors Corp.*, 466 F.2d 812, 815-816 (6th Cir. 1972). So, here, the trial court's finding of lack of good faith (Finding 7, Conclusion 7, App. 130 and 132) after the EEOC "amended its regulations" in 1972 presumes incorrectly that the EEOC has legislative authority.

Pay Act) (*Corning Glass Works v. Brennan,* 417 U.S. 188, 207, 41 L.Ed.2d 1, 17, 94 S.Ct. 2223 (1974), 29 U.S.C. §206(d)(1)). The Department is penalized by the decision because it must now reach into other city revenues to pay the difference. (See *Edelman v. Jordan* (1974) 415 U.S. 651, 653.)

It is likewise interfered with by the permanent injunction. Any legislation of Congress under either the Fourteenth Amendment or under the commerce clause, for example, which interferes with the authority of local governmental entities to establish pension plans for its civil service employees would be an invalid invasion of local sovereignty. So would a law requiring payment of higher compensation to female civil service employees than males.

For the same reasons, the permanent injunction of the lower court and its award of back contributions exceeds the limitations of the Tenth Amendment. Such amendment is a limitation on all the powers delegated to the United States, including the judicial power delegated by Article III, and not merely a limitation on those legislative powers that have been delegated to the Congress by Article I. As the Congress may not enact a law which interferes with local sovereignty, so the Court may not issue a decree which so interferes.

Assuming *arguendo* that by enacting Title VII Congress had enacted a law which required the payment of higher compensation to female civil service employees than to males, for the courts to give effect to such a law would exceed the constitutional limitations on the *courts'* power. The court may not so act. That was the precise holding of *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803). The Court held that it would *not* exercise a power (even though Con-

gress purported to confer or acknowledge it) when to do so would have the effect of the Court exceeding constitutional limitations upon it. The duty of the Court, the Chief Justice said, is to "read and obey" the law which *limits* the Court's power.[12]

For the same reasons dealing with the Tenth Amendment, we submit that there also is a violation of the Eleventh Amendment by the decisions below, *i.e.,* that to apply the statute in a manner outside the purview of the Fourteenth Amendment removes it from Congressional authority under the Fourteenth Amendment. In *Fitzpatrick v. Bitzer, supra,* 427 U.S. 445, 456, fn. 11, the Court noted that such challenge was not raised there. We have raised and do raise such a challenge.

There is another major jurisdictional limitation exceeded by the decisions below. Section 5 of the 14th Amendment gives the *Congress* the authority to enforce that article by appropriate legislation. That grant of authority is, we submit, exclusive. Especially where (as here) the Congress has *exercised* that authority, where it has enacted certain policies into law, it is not within the powers of either the executive or the judicial branch to give effect to *different* policies even for the purposes of "enforcing" the 14th Amendment. Any different view would lead to governmental chaos.

---

[12]The rationale of the decision was that prerogative power (including the power to issue prerogative writs) was a power over and above and outside law. John Locke, for example, so described the power in his treatise *On Civil Government.* The Court held it must act under and according to law. Even though Congress recognized authority in the Court to issue such writs and exercise such prerogative power, the Court would not do so. In contrast, the courts below held they might exercise power even where not limited to them by Congress. The entirely different idea that the Court had authority *superior* to legislation was introduced in *Dred Scott v. Sanford* (1856) 19 How. 393, 15 L.Ed. 691.

We have above noted the express jurisdictional limitation on the executive's following different policies. The executive is charged that "the laws be faithfully executed" (Art. II §3.) The limitation of faithfulness likewise applies to any agent (such as the EEOC) that is an agency of Congress, its principal. The EEOC may not act except under and pursuant to the authority delegated by Congress.

Express limitations also exist with respect to the courts' authority. Congress has clear constitutional authority to specify the jurisdiction of the courts. Const. Art. III. *Sheldon v. Sill* (U.S. 1850) 8 How. 440, 12 L.Ed. 114; *Ex Parte McCardle* (U.S. 1869) 7 Wall. 506, 19 L.Ed. 264.

Thus, where, as here, Congress has not only exercised the authority granted by Section 5 of the 14th Amendment, but has also limited the courts' jurisdiction under that statute to those "adverse *actions*" as are defined by the statute and are "intentionally engaged in", it is not within the courts' power to develop broader definitions of unlawful discrimination in terms of "systems or effects" or otherwise. In fact it was to prevent that possibility that led to adopting the jurisdictional limitation in 1964. While in 1972 it was proposed to permit the development of a broader definition of unlawful discrimination in terms of "systems and effects", that proposal was rejected and the jurisdictional limitations expressly reaffirmed. (Ex. C-24-26.)

Since 1972 the courts may now exercise broader *remedial* authority than under the 1964 statute, *after* it has been found that an "adverse action" as statutorily defined has been "intentionally engaged in". However Congress in 1972 again precluded the courts from

any "common-law-making" role in defining unlawful employment practices by express reaffirmations of the jurisdictional limitations of Title VII. (Ex. C-26.)

Of course Congress may so limit the courts. "There can be no question of the power of Congress to define and limit the jurisdiction of the inferior courts of the United States." *Lauf v. E. G. Skinner & Co.*, 303 U.S. 323, 330 (1938). Where the courts act in excess of statutory jurisdiction they also act in excess of Article III.

The trial judge herein seemed unconcerned with the statutory language. He did not even make the findings which the statute requires as the condition precedent to the exercise of the courts' *remedial* jurisdiction under the statute (Ex. B-4-5), namely, that the City was "intentionally engaging in" an unlawful employment practice as statutorily defined. The trial court likewise ignored the jurisdictional limitation on an award of "back pay"—that such shall not be awarded if the action of the employer was "for *any* reason other" than discrimination[13] on account of sex (Ex. B-4-5). These lapses of the trial court, plus its reliance on the EEOC "amended regulation" demonstrate that the trial court was not exercising its statutory *judicial* jurisdiction, but some new legislative jurisdiction.

That the Court may not act in excess of statutory jurisdiction (even if it had "enforcement" authority

---

[13]There was extensive and careful attention given to the meaning of "discrimination" in the 1963-64 debates. The Congressional Record is very clear that although the *opponents* of the bill charged it had a new broad, sweeping meaning, the *proponents* of the bill whose intent is controlling said that it had the same well established meaning it already had under a number of already existing statutes. (110 Cong. Rec. 7218, 5803, 5437, 7477.)

under the Fourteenth Amendment) is one of the foundations of the "checks and balances" of American government. See *Sheldon v. Sill* (U.S. 1850) 8 How. 440, 12 L.Ed. 114; *Ex Parte McCardle*, 7 Wall. 506, 19 L.Ed. 264.

IV

THE DECISION OF THE LOWER COURT IS CONTRARY TO GENERAL ELECTRIC V. GILBERT.

General Electric.

In *General Electric*, the Court recognized the appropriateness of life expectancy (correlated with sex) as a factor other than sex for which differential compensation was allowed by the Bennett Amendment, under Title VII. *General Electric, supra*, p. 144, 50 L.Ed.2d 343, 359.

The Court noted the acceptability under Title VII of a benefit package which was not proven to be worth more to men than women. *General Electric, supra*, 50 L.Ed.2d 343, 356.

The Court noted the appropriateness of the use of actuarial tables to show that a benefit plan was not a mere pretext to invidiously discriminate. *General Electric, supra*, 131-135, 50 L.Ed.2d 343, 354. On the other hand, in this case the courts below made the erroneous assumption that Title VII *requires* a municipal employer to pay *greater* economic benefits to one sex than to the other. They failed to correct this error even after this Honorable Court said:

> "The District Court was *wrong* in assuming, as it did, 375 F.Supp. at 383, that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required

> to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.'" *General Electric, supra*, 50 L.Ed.2d 343, 356, fn. 17, 97 S.Ct. 401, 410, fn. 17. (Emphasis added.)

That the statutes do not require payment of greater benefits to one sex than the other is evident from their provisions.

The Equal Pay Act provides:

> "[A]n employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

To raise the compensation as to women generally above that of a man, "reduces" compensation as to men by comparison.

Title VII does not require any of the alternatives suggested by the courts below, all of which would have the effect of requiring that the employer pay females more or that the male employees (and their wives) subsidize larger female employees' benefits. We do not contend on the record here presented that the employer may not voluntarily pay more to fund the larger female life expectancies; we do contend that such is not *required* by the statute. The statutory prohibition is directed to payment of unequal *wages* for equal work. *A fortiori* compensation may differ. A rational *bona fide* classification is sufficient under the statutes.[14] For the lower courts to require the payment of more compensation to one sex than the

---

[14]Such conclusion would resolve the "no-win" situation raised by the men's complaint that the Plan unlawfully discriminates against men. (App. 81.)

other as they did, violated the statutes before them on their own rationale.

The majority opinion of the Court of Appeal infers that the failure to include a number of other characteristics which arguably may also affect longevity, such as smoking, drinking and obesity, makes sex differentiated actuarial tables unacceptable.

Such reasoning is its own refutation. If sex plus age (*i.e.* longevity) can not be an "other factor other than sex" warranting a payment differential under the Bennett Amendment in and of itself, the addition of other characteristics will not make it so. The addition of other characteristics will not alter the underlying basic difference in life expectancy between males and females of the same age. It will only add other characteristics—sex-neutral characteristics—on top of "differentiation upon the basis of sex." (42 U.S.C. §2000e-2.)

Either age plus sex-differentiated actuarial tables are permissible under the Bennett Amendment, or they are not. Either they constitute invidious discrimination or they do not. To hold that they might be acceptable if they also incorporate differentiation for smoking, drinking, obesity, and the like, is to acknowledge that such tables are acceptable.

The mere fact that your petitioners could have incorporated other characteristics affecting longevity does not mean that they must, nor does it invalidate the characteristics used. This Court rejected a similar argument regarding the disability program's failure to exclude other disabilities than pregnancy in *General Electric*.

As noted in *General Electric*, the package here provided covers the same category of risk for males and

females. There is no proof that the package is in fact worth more to men than women. The pension cost is nothing more than extra compensation. Remove the fringe benefit and increase wages by the amount paid for pensions by the employer, and the female would still have to pay more than the male to purchase an annuity paying the same periodic benefits as the male's. *General Electric, supra,* pp. 138-139. The respondents seek to have the employer compelled to pay the difference. Title VII does not require it.

Conclusion.

The order of the courts below which was outside the statute would have drastic, widespread consequences to government and industry, threatening the financial stability of pension systems at a time when many such systems are already severely strained and freeze into law a system adversely affecting male employees and their female non-working spouses. It was not the intent of Congress to cause such significant and sweeping consequences to government and industry. *Willingham v. Macon Telegraph Publishing Co.,* 507 F.2d 1084, 1090 (5th Cir. 1975).

The law sought by respondents is contrary to the Equal Pay Act and Title VII, which on the face of both statutes, permit the differentiation provided in petitioners' Plan. Furthermore, legislative history clearly shows that Congress intended to allow different life expectancy to be differently treated by the employer.

To reach the result below, the courts had to ignore the statutory language, and the legislative intent, and instead defer to interpretative bulletins of the administrative agencies, in the face of the will of Congress and this Court's judgment to the contrary.

In reaching the result below, the court further applied a standard outside the purview of the Congressional authority under the Fourteenth Amendment. Essentially the court said *all* differentiation regardless of intent violates the law. The court refused to find a discriminatory purpose, refused to allow any classification such as that permitted under the Fourteenth Amendment, and in so doing, violated its responsibilities under Article III of the Constitution and Title VII which limits its jurisdiction. To sustain such determinations of the courts below, would therefore violate the Tenth and Eleventh Amendments to the United States Constitution.

Since respondents have conceded the actuarial premise underlying the petitioners' Plan, it is submitted that it would be appropriate for this Honorable Court to remand the case to the court below with directions to enter judgment on the Title VII issue in favor of your petitioners. Petitioners respectfully request that the Court of Appeals' decision, therefore, be reversed with such directions to the District Court.

Respectfully submitted,

BURT PINES,
City Attorney,
EDWARD C. FARRELL,
Chief Assistant City Attorney for Water and Power,
J. DAVID HANSON,
Deputy City Attorney,
DAVID J. OLIPHANT,
Deputy City Attorney,
By DAVID J. OLIPHANT,
Deputy City Attorney,
Attorneys for Petitioners.

EXHIBIT A.

United States Constitution
Article I, Sections 1 and 8 (Clauses 9 and 18).

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 8. The Congress shall have power—

. . .

To constitute tribunals inferior to the Supreme Court.

. . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article II, Section 3.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Article III, Sections 1 and 2.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to

time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizen of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Tenth Amendment.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Eleventh Amendment.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Fourteenth Amendment, Sections 1 and 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

EXHIBIT B.

Fair Labor Standards—29 U.S.C. § 206.

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or

any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

42 U.S.C. § 2000e-2.

Unlawful Employment Practices.

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any

such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

* * *

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under

this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

42 U.S.C. § 2000e-5(g).

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

EXHIBIT C.

Legislative History of Acts.

I.

The Equal Pay Act.

In enacting the Equal Pay Act, the 88th Congress specifically intended that employers might continue to classify people as "men" and "women" for compensation purposes so long as the classification involved actual or good faith differences as the basis for the differences in pay and was not a mere subterfuge to pay women less for work of the same class.

1. *The House Substantive Provisions:*

Both the House Committee Report and Supplementary views detail the important background to the Equal Pay Act. (U.S. Code, Cong. & Adm. News, 1963, pp. 688 *et seq.*) The same was spelled out on the House floor.

A number of changes had been worked out in previous sessions of the House. However "unfortunately the administration incorporated only a few of these changes when it submitted a new equal pay bill . . . this year. . . . Fortunately . . . Mr. Goodell introduced . . . bill . . ." for the first time to amend the Fair Labor Standards Act. (109 C.R. 9195; 5/23/63.)

"The concept of equal pay for jobs demanding equal skill has been expanded to require equal effort, responsibility. . . . These factors are the core of all job classification systems." (109 C.R. 9195.)

. . . .

"A bona fide job classification system will normally furnish the answer to a claim of discrimination." (109 C.R. 9196.)

The House Committee noted that an employer might pay male packagers and female packagers differently where there were real and not merely nominal differences as the basis for the different pay. (109 C.R. 9196, 9209; 2/23/63.) If the male packagers were required to lift heavy boxes and the female packagers were not, more compensation might be paid to the male packagers.

The Committee Report pointed out that it was prohibiting pay differentials based *solely* on sex and not on some correlated factor. "Supplementary Views" accompanying the Committee Report also announced the rejection of the administration's broad policy. The differences in the two bills were also explained by the Committee on the House floor.[1]

The House Committee Report said in part:

> "Section 2 of the bill (H.R. 6060) amends section 6 of the Fair Labor Standards Act by adding a new subsection thereto. This subsection, in effect, declares that wage differentials based *solely* on the sex of the employee are unfair labor standard. . . . Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that *any* of these exceptions shall be *exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included* . . ." (Emphasis added.)

---

[1]"I think it is important that we have clear legislative history on this point. . . . The clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' . . ." (109 C.R. 9197, 5/21/63.) "The burden would be on the Department of Labor to prove the exceptions are *not* true." (109 C.R. 9208, 5/23/63). (Emphasis added.)

The intent of the broad exclusion is shown by explicit legislative history on the House floor. Congressman Findley offered an amendment to the bill to add an *additional* exception that would permit *inter alia* differences in wages if there were other costs to the employer in employing women in the same work class as men, so as not to penalize the employer for so employing women. (109 C.R. 9217.)

This amendment was rejected on the ground that there was no necessity for such *additional* exception as the matter was already covered by exclusion four. The House Committee chairmen and members stated they wanted the legislative history to be clear. Thus, Congressman Thompson (in charge of the bill) and "the language the gentleman [Mr. Findley] would add is redundant"; "the protection the gentleman [Mr. Findley] seeks already exists in the bill. I agree with the gentleman [Mr. Goodell who wrote the bill before the House] that the legislative history should show our intention". Then in direct answer to a direct question from Congressman Pucinski, the Chairman stated that "any other factor other than sex" covered what Congressman Findley was trying to do. (109 C.R. 9217, 5/23/63.)

Thus the controlling legislative history and the explicit language of the House Committee bill (H.R. 6060) which became the law, shows that it is certainly *not* the intent of law to require the employer to pay women more total compensation than men.[2]

---

[2]Both houses considered longevity as a basis for adding the general exception to the Equal Pay Act. (See H.R. 6060, quoted in H.R. Rep. No. 309, 88th Cong. First Sess., 7 (1963); s. 1409, quoted in S. Rep. No. 176, 88th Cong. First Sess.,

(This footnote is continued on next page)

2. *The Senate Substantive Provisions:*

The Senate history shows the same specific intent.

The Senate Sub-Committee (of which Senator Randolph was co-chairman) held hearings and substituted a bill with four exemptions for the Administration's bill. (S. 109 C.R. 2886, 2/25/63.) Senator Randolph was co-author of the Sub-Committee bill. (109 C.R. 8915, 5/17/63.) The Senate Committee, in turn, substituted a bill with only the single broad exception—any other factor other than sex. The intent of the Committee bill was that the fourth exception included *inter alia* the other three exceptions of the Sub-Committee bill.

The Senate Committee Report accompanying the bill noted that in addition to these exceptions, the Senate intended to allow additional exceptions under that broad category where "an employer will be economically penalized by the elimination of a wage differential. . . ." because other costs such as pension costs were higher for women.[3] This intent, expressed by

4, 6 (1963). Hearings before the House and Senate in March and April of 1963 placed before Congress the higher cost of retirement benefits for women than for men, and was a factor providing impetus for the addition of the subsection (iv) exception. Hearings on H.R. 3861 and Related Bills, before the Special Subcommittee on Labor of the House of Representatives, 88th Cong. 1st Sess. (1963), 103, 184-186 and 241; Hearings on S. 882 and S. 910 before the Subcommittee on Labor of the Committee on Labor and Welfare, United States Senate, 88th Cong., 1st Sess. (1963) 142 and 145.)

[3]The Senate Report said in part:

> "During the course of the hearings, testimony was introduced on the question of the cost which employers encounter in the employment of women which they do not encounter in the employment of men. . . . Some employers stated that the costs of their pension and welfare plans were higher for women than men because of maternity costs in their health benefits and because of the longer lifespan of women in pension benefits. . . . It is the intention of the committee that where it can be shown that on the basis of all of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential, the Secretary can permit an exception similar to those he can permit for a bonafide seniority system or other exception above mentioned." (109 C.R. 8915, 5/17/63). The House bill which was enacted did not leave "approval" to the Secretary but required the Secretary to prove a violation in court.

the Senate Report, was identical to the intent of Congressman Findley's amendment which the House likewise stated was included in the fourth exemption.

The Senate passed the Senate Committee bill with only the broad fourth exclusion. The House, after adopting H.R. 6060, struck the language of the Senate bill and substituted therefor the language of H.R. 6060. When both bills were then returned to the Senate, Senator Dirksen made the point that he had spoken with those who would be conferees and "there is general agreement that the House language is quite preferable to the language contained in the Senate bill." (109 C.R. 9762, 5/28/63.) The Senate thereupon adopted the House bill with the *four* exemptions expressly stated.

II.

Title VII of Civil Rights Act.

The same 88th Congress which adopted the Equal Pay Act also enacted the Civil Rights Act. The original legislative proposal came from the Justice Department.

1. *House Action Substantive Provisions.* When Title VII was debated, Congressman Smith (Va.) proposed to add the word "sex" to various sections of

the title (110 C.R. 2577, 2/8/64). One serious argument was presented in its favor, first by Congresswoman Griffith and then by others. (110 C.R. 2578-80, 2/8/64). The argument was *not* that discrimination on account of sex should be legislatively treated in the same way as discrimination on account of race or color. The argument was *rather* that the addition of "sex" was necessary to ensure "color blind" application of Title VII among women in the labor market. The *absence* of the amendment, it was urged, could have a practical effect of giving women of one race, color or religion a practical edge over women of another race, color or religion, in the labor market[4] (110 C.R. 2579, 2582, 2583, 2584, 2/8/64).

The opposition to the amendment was likewise based on "the experience which the Congress had with respect to the equal pay legislation" and other experience which dictated that legislatively, discrimination on account of sex should *not* be treated in the same way as discrimination on account of race or color. (110 C.R. 2581, 2577-8, 2582).

After the amendment passed, Congressman Goodell proposed adding "sex" as a bona fide occupational qualification. (110 C.R. 2804, 2/10/64.) The Goodell

[4]The argument was stated in its baldest form by Congresswoman May, by quoting "a letter from Emma Guffey Miller, national chairman of the National Woman's Party" to the effect that regardless of what Congress intended the bill would be interpreted and applied in a way that would give an advantage in the job market to certain classes of women and result in discrimination against other women and that the bill should be amended to avoid that result by adding "sex". [110 C.R. 2582, 2/8/64].

amendment was accepted without question (110 C.R. 2804). The House had previously rejected an amendment to make "race or color" a bona fide occupational qualification. (110 C.R. 2550, 2/8/64.)

Thus, the House did not intend to treat "sex" and "race or color" the same way or to prohibit all classifications of employees as "male"/"female" (e.g., women nurses to care for women. [110 C.R. 2718, 2/10/64]).

The legislative proposal as it came from Committtee permitted the courts to apply remedies *unless* the action of the employer had been "for cause." This implied a very broad jurisdiction in the Courts; and that the burden was on the employer to show that the "failure to hire" etc. was for cause.

The House Committee changed the language[5] on the House floor to make clear that actions by the employer "for any reason other" than the prohibited five reasons were *not* unlawful and it is outside the jurisdiction of the court to order remedies unless the employer's action was for a prohibited reason. (110 C.R. 2566, 2/8/64.)

When the bill reached the Senate, Senator Humphrey explained that the purpose of the language was to

[5]"Mr. CELLER. Mr. Chairman, the purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts *other*—and I emphasize 'other'—than discrimination on the ground of race, color, religion, or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion, or national origin. That is the purpose of this amendment." (110 C.R. 2566.)

clarify that action for reasons other than those five prohibited were not unlawful.[6]

2. *Senate Action Substantive Provisions.* When the House bill (H.R. 7152) reached the Senate, extensive debate centered on whether the bill should be referred to the Senate Committee already conducting hearings on the Justice Department bill (110 C.R. 3715, 2/26/64). Both Senators Dirksen and Morse favored such referral.[7] One of the major concerns was to establish clear legislative history. The other concern was to give considered study to the possible effects of the bill as drafted. (110 C.R. 2884, 3715, 6445-6451).

Extensive debates focused on questions and objections to the House bill as drafted, even before the bill was made the pending business. Senator Dirksen introduced a memorandum of objections regarding matters as to which clear legislative intent was essential. (110 C.R. 3715, 3719, 4754, 6417, 6450, 6455).

In a succession of procedural steps the Senate determined to consider the bill on the floor instead of referring to a regular committee (110 C.R. 3719, 4754, 6417, 6455).[8]

Thereafter because of major concerns of Senators Dirksen, Humphrey and others that due consideration be given the bill because of its possible effects, five major determinations were made regarding consideration and preparation of a proper bill.

(1) First Senator Humphrey (floor manager of the entire bill) and Senator Clark and others purposely undertook to make a daily analysis of all views presented concerning the bill, including the views of those who favored a bill but had genuine concerns about some aspect of it. (110 C.R. 4858; 3/10/64.) These

---

[6]"This relief is similar to that available under the National Labor Relations Act in connection with unfair labor practices, 29 United States Code 160(b). No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of section 707(e), which makes clear what is implicit throughout the whole title; namely that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex, or national origin. . . ." (Senator Humphrey, 110 C.R. 6561.)

[7]Both senators were fully conscious of their legislative duty. Senators Dirksen and Morse were both members of the Senate Judiciary Committee. They were aware that in the House, the House Judiciary Committee had adopted the Attorney General's bill, as a substitute for the Sub-Committee bill, with little time to examine the Justice Department's proposal. (House Report No. 914, 11/20/63, U.S. Code Cong. & Adm. News, 1964, pp. 2355, 2414-15.) The Senate Committee had heard only one witness on the bill, the Attorney General who had drafted it [110 C.R. 3715, 2/26/64]. Senator Dirksen particularly, but Senator Morse as well, thought that proper discharge of the Senate's duties required that a committee hear and consider views, other than those of the Attorney General, regarding a bill that could have profound social, economic and political impacts as the House bill seemed to portend [110 C.R. 2884, 3715, 6445-6451].

[8]The Senate tabled an appeal from a parliamentary ruling [110 C.R. 3719 2/26/64]; the Majority Leader, Senator Mansfield, made a motion to make the bill the pending business [110 C.R. 4754 3/9/64] which was adopted [110 C.R. 6417 3/26/64]; and it tabled Senator Morse's motion to refer the bill to the Judiciary Committee with directions to report it back on a date certain [110 C.R. 6455 3/26/64].

It had already been announced by the Senate Majority Leader when the bill was received from the House, that when the Senate took up the bill that Senator Humphrey would manage and speak for the bill on the Senate floor, with Senator Kuchel speaking for the minority party [110 C.R. 2882-3 2/17/64]. Further, when it appeared that the bill would not go to Committee, it was announced that two senators would be in charge of each title of the bill, with Senators Clark and Case for Title VII [110 C.R. 4858-59 3/10/64].

analyses were presented as a daily "newsletter".[9] The intent of the bill according to its proponents was fully exposited therein. The newsletters were distributed to all Senators and subsequently printed in the Record.

This procedure is particularly important to a proper interpretation of the Act. Reading of the debates makes clear (as it was clear to the Senate itself) that "it is the first time I ever recall when major legislation was being considered on the floor that the opponents of a bill have sought to place on the measure a broader interpretation than have the proponents." (Senator Ribicoff, 110 C.R. 8427.)

In short, the statements of the opposition can not be taken as implying the intent of the bill. Adoption of the bill was a *rejection* of the views of the opposition.

(2) The second major determination was to have an "ad hoc committee" consider the varying views presented and prepare a substitute bill.[10]

Because of the genuine concerns of a number of Senators on a number of issues, (and there were hundreds of amendments that had been introduced) Senator Humphrey, Senator Dirksen, Senator Clark and others, formed an *ad hoc* committee to consider the views

[9]This procedure was objected to by opponents of the bill [110 C.R. 5044] but defended on the ground that it was essential that the proponents make their position clear to other Senators. These newsletters were distributed to all Senators and then published in the Congressional Record [110 C.R. 7474, 4/9/64; 110 C.R. 9105; 110 C.R. 14464, 6/19/64].

[10]Senator Dirksen introduced several amendments in the earlier stages of the debates [110 C.R. 8192 4/16/64] but the principal results of this *ad hoc* committee approach were two amendments, No. 656 [110 C.R. 12817, 11926, 11935] and No. 1052 [110 C.R. 13310]. Each was presented as a Dirksen-Humphrey *et al.* bill; each was in the nature of a substitute for the House bill (H.R. 7152); and when the later (No. 1052) was presented, it displaced the earlier (No. 656).

of all Senators and prepare a substitute bill. The Dirksen-Humphrey, et al., substitute bill was later introduced. It was first introduced as Amendment No. 656, and later as Amendment No. 1052. (110 C.R. 12706-7, 12807, 12817, 12831, 11926, 11935).

This ad hoc committee procedure permitted a substantial majority to consider, amend, and understand the substitute bill in its entirety before voting closure.[11]

(3) The third major determination pending the preparation of the substitute bill was to prepare and introduce interpretive memoranda as to the intent of the House bill, in addition to speeches presenting the House bill and the later presented Dirksen-Humphrey bill.[12] Senators Clark and Case in charge of Title VII of the House bill prepared and introduced interpretive memoranda declaring the intent of that Title. (110 C.R. 7203-59.)

In doing so they answered a question as to the intent of the House bill relating to the instant case.

[11]The second Tower amendment on testing, considered in the case of *Griggs v. Duke Power, supra,* was offered without objection, after cloture had been voted. The amendment was acccepted by Senator Humphrey, *et al.,* as stating the intent of the Title even without such amendment.

[12]Thus, Senator Humphrey spoke to the bill [110 C.R. 6528 3/30/64] and then Senator Kuchel [110 C.R. 6554, 3/30/64]. Senators Clark and Case not only explained the bill [110 C.R. 7203-7259 4/8/64] but also introduced interpretive memoranda [110 C.R. 7213] including memoranda answering questions of Senator Dirksen and others [110 C.R. 7215-18].

Senator Humphrey, too, made an extended presentation of the substitute bill's terms [110 C.R. 12706, 12807 6/4/64]. Senator Dirksen had made similar explanations and had introduced a memorandum explaining the differences between No. 656 and the House bill [110 C.R. 12381, 12817]. (The major difference between substitute No. 656 and No. 1052 concerned jury trial.)

Such question had been earlier raised by Senator Dirksen. (110 C.R. 6445-51.) The Memorandum stated:

> "Objection: The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.
>
> "Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, *except where there is a rational basis for discrimination,* on the ground of bona fide occupational qualification. *The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.*" (110 C.R. 7217) (Emphasis added).

Thus Congress did not intend to outlaw rational differentiation, or rational classification,[13] although the lower courts herein held to the contrary.

---

[13]Senator Clark in presenting Title VII agreed that sex classification was allowable. Under the House bill "wherever sex is a bona fide job qualification or disqualification for a particular job, Title VII does not require that equal job opportunity be given to both sexes." [110 C.R. 7217].

> "Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion." [110 C.R. 7213].

(4) The fourth major determination was made with respect to the manner of introducing the Bennett amendment (No. 1051), then the new substitute bill (No. 1052) and the voting of cloture immediately thereafter.[14] Voting of cloture prohibits, of course, the introduction of new amendments.

The new Dirksen-Humphrey substitute (No. 1052) included provisions excepting from the prohibition of unlawful employment practice "good faith merit system" and other exclusions intended to reach a number of problems, including the "testing" problem that had occupied so much of the Senate's attention.[15]

However, just before introducing the No. 1052, Senator Dirkson yielded to Senator Bennett who introduced No. 1051. Such was therefore on the table before

---

[14]Immediately before offering amendment No. 1052, Senator Dirksen yielded the floor to Senator Bennett who introduced Amendment No. 1051 regarding the Equal Pay Act [110 C.R. 13310]. Immediately thereafter Senator Dirksen introduced No. 1052 (the Dirksen-Humphrey substitute), and almost immediately thereafter, the Senate adopted a motion for cloture [110 C.R. 13327 6/10/64]. The cloture motion had been pending for some time [110 C.R. 12831, 12860] but was not called to a vote until the Dirksen-Humphrey substitute (No. 1052) was introduced. One result of cloture was, of course, that the time of each senator to speak relating to H.R. 7152 and the many amendments thereto, was strictly limited.

[15]The discussion on testing was hardly a debate, since there seemed to be only one side. It was provoked by an administrative decision from Senator Dirksen's home state. The proponents of the civil rights bill were unanimous that such result was impossible under Title VII of the House bill. The "good faith merit system" provision was said to have been included in the Dirksen-Humphrey substitute to preclude interpreting "unlawful employment practices" more broadly than the Congress intended.

cloture was voted and the proponents of No. 1052 could *thereafter* accept it as an amendment to their bill.[16]

Senator Dirksen had earlier explained the necessity of treating "sex" and "race or color" differently:

> ". . . since discrimination on account of sex is a vastly different problem than discrimination because of race, color, or national origin, we should give further attention to the best manner to deal with that problem." [110 C.R. 6459 3/26/64].

Both Senators Dirksen and Humphrey expressly accepted the Bennett amendment as an amendment to *their* bill (No. 1052) and to explain the reason for adding it to their proposal No. 1052. Both Senators Dirksen and Humphrey explained that the amendment was necessary in order to carry the exemptions of the prior Act into the Title VII. (110 C.R. 13310, 13647.)

(5) The handling of the matter in this way avoided another major problem. One amendment placed on the table by Senators opposing *any* bill, proposed to add the word "solely" to the jurisdictional section. With respect to "race or color" such amendment would have appeared to require specific intent — that race or color was the *only* reason for adverse action and that an employer could avoid liability if he showed any *additional* reason for his action. Such amendment was unacceptable in that context of course.

However, by incorporating the exceptions and policies of the equal pay bill as to *compensation between the sexes,* the Senate could (and did) permit differential

[16]Since debate was limited by cloture, comment was necessarily brief [110 C.R. 13647 6/12/64].

compensation where not based on sex solely (but based on some other additional differential though correlated factor, such as longevity) without adding the word "solely" to the jurisdictional section which would have defeated the intent of the proponents of the bill on the other different subject of "race or color".

Accordingly, after the Dirksen-Humphrey bill (with the Bennett amendment) was substituted for the language of the House bill and was the pending business (110 C.R. 14239; 6/17/64), Senator Humphrey was asked a clarifying question as to the intent and effect of the bill in the area of different treatment of the sexes.

> "Mr. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota (Mr. Humphrey), who is the effective manager of the pending bill, *a clarifying question* on the provisions of title VII.
>
> "I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing.
>
> "Am I correct, I ask the Senator from Minnesota, in assuming that *similar differences of treatment in industrial benefit plans,* including earlier retirement options for women *may continue in operation under this bill, if it becomes law?*

"Mr. HUMPHREY: Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment, so there can be no doubt about it.

"Mr. RANDOLPH. I am grateful for the reply." [110 Cong. Rec. 13663-4 6/12/64] (Emphasis added).

The Senate, and especially Senator Humphrey was vitally aware of the need to make a legislative record as it did. (110 C.R. 4858.)

Finally, the Senate added the word "intentionally" with respect to the jurisdictional limitation. Again, as in the addition of "any reason other" in the House, the purpose was to express the intent of the bill as law—that action for another reason was not prohibited by the Act. (110 C.R. 12723-4.) It was made clear that "discrimination" had the same meaning it had had in FEPC laws and other laws for years. The Fair Labor Standards Act was also mentioned.[17]

3. *House Action.* When the Dirksen-Humphrey bill was passed by the Senate and returned to the House, the presentation to the House as to the effect of the Bennett Amendment stated:

---

[17]"Objection: The language of the statute is vague and unclear. It may interfere with the employers' right to select on the basis of qualifications.

Answer: Discrimination is a word which has been used in State FEPC statutes for at least 20 years, and has been used in Federal statutes, such as the National Labor Relations Act and the Fair Labor Standards Act, for even a longer period.

To discriminate is to make distinctions or differences in the treatment of employees, and are prohibited only if they are based on any of the five forbidden criteria (race, color, religion, sex, or national origin); any other criteria or qualification is untouched by this bill." (110 C.R. 7218 4/8/64). See also Senator Humphrey quoting Justice Charles Whitaker, 110 C.R. 503-04 3/21/64; 110 C.R. 5437, 110 C.R. 7477).

"The Senate amendment also— . . .

"Second. Provides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex—section 703(b): . . ." (110 C.R. 15896, 7/2/64).

III.

Administrative Interpretations of Law.

The questions of the Courts' responsibilities and the legal effect (if any) to be given administrative interpretations of the statutes was a matter carefully considered by the 88th Congress, both in regard to the Equal Pay Act, and in regard to Title VII.

Legislative intent is shown by what the Legislature *rejected* as well as by what it adopted. This point is important where, as here, the administration introduces a bill which Congress rejects, and the administration then asks the courts to give effect to the law enacted *as if* the Administration's bill had been enacted, when in fact Congress rejected it. Such a practice would seem to exceed the Constitutional duty "to take care that the laws be faithfully executed." (Art. II.)

1. Equal Pay Act. In enacting an equal pay bill, the controlling House Committee Report, and the debates on the House floor show that Congress established the Secretary of Labor as a prosecutor, and recognized that as such he had inherent authority to state his position. But his bulletins could only be used in Court as a shield for the defendant, not as a policy-making sword. It was entitled to weight only in defendant's favor.

The administrator could give "guidance" to those being regulated, but could *not* give "guidance" to the courts *against* defendant.

Congressman Goodell stated *inter alia:*

> "We are not allowing the Secretary of Labor to make decisions which exclude the court from an independent new interpretation of this Act, as to whether the words we use are being administered reasonably and properly." (110 C.R. 9198; 5/23/63.)

The Supplementary Views to the Committee Report stated in part:

> "Since this bill now before the House differs substantially from either last year's proposals or this year's administration bill, we feel that these changes should be pointed out. The following are the major differences between the bill reported by the full Education and Labor Committee and the earlier administration proposal. Under the committee bill:
>
> . . .
>
> "4. Enforcement must be obtained in the Federal Courts and not arbitrarily through an all-powerful administrative body.
>
> . . .
>
> "11. The Secretary of Labor is not given broad regulatory and rule making authority. ['There would be no new regulations' 109 CR 9203.] . . ." House Report No. 309, 5/20/63; U.S. Code, Cong. and Adm. News pp. 689-90; 109 CR 9209 *et seq.*

The debates on the House floor showed the same intent:

"With reference to regulations, we have talked a great deal about this. It is an oversimplification but, generally speaking, *we have three different types of guidance that can be offered by the Administrators to those who are being regulated.* One of them is legislative regulation. . . .

"That was in the original proposal this year and it was in the proposal last year, granting legislative regulatory authority. It is out of this bill. We also knocked out the right of the Secretary of Labor *even to issue interpretative regulations.*

"*I emphasize that interpretative regulations are also barred.* . . . [italics added]

". . . The Secretary, in my opinion has the inherent authority to write interpretative bulletins. All this amounts to is *telling the public* the Secretary's interpretation of the law for the guidance of those who are to be regulated. *Such bulletins have no standing in court,* but they are there as a guidance to the court as to what the view of the administrator *was. They have no other significance, except that if an employer relies on this interpretative bulletin, he is protected.* He is not in violation if he has done something in reliance upon those interpretative bulletins . . ." (109 C.R. 9208-9209; 5/23/63.) (Emphasis added.)

". . . The Secretary may believe that a violation exists but the court *will make a second independent judgment.* This is very significant . . . (italics added)

"MR. THOMPSON of New Jersey. Indeed, we are not granting any such authority, but the fact

is that we are specifically and categorically restricting it, so that this is a negative action rather than a positive one." (109 C.R. 9198; 5/23/63.)

"Eighth, It is not intended that the Secretary of Labor or the courts will substitute their judgment for the judgment of the employer and his experts who have established and applied a bona fide job rating system." (109 C.R. 9209; 5/23/63.)

With respect to the procedure of proof by the prosecutor Congressman Goodell was also very clear:

"The burden will lie completely on the Department of Labor to establish a prima facie case that there is discrimination.

"When the burden of proof lies on the Secretary of Labor, I think it should be made clear that he must show that the violations are not based on a merit system, that he must show they are not based on a seniority system, that the violations he is claiming are not based on piece rates of production, and that the violations he is claiming occur are not based on any of the other factors other than sex. That is his burden.

"Having established the prima facie case in the Federal Court the burden itself will shift to the employer to prove or disprove the allegations of the Secretary of Labor. This is the procedure we have in mind. The employer does not have to prove the exceptions as an affirmative defense. The burden remains on the Secretary of Labor to prove that the exceptions do not apply. We do not have in mind the Secretary of Labor's going into an establishment and saying, 'Look,

you are paying the women here $1.75 and the men $2.10. Come on in here, Mr. Employer, and you prove that you are not discriminating on the basis of sex.' That would be just the opposite of what we are doing." 109 C.R. 9208.

2. Title VII. The House Committee adopted the Justice Department civil rights bill with a minimum of debate. However, the House Committee proposed a number of *clarifying* amendments on the House floor. One of these was to insert the word *"procedural"* regulations to make clear that the EEOC had *no* authority as to interpreting *substantive* law. (110 C.R. 2575.) The amendment was added "to make more definite the limitation on his powers". A second was to insert the requirement that there must be "reasonable cause" before the EEOC brings suit. The purpose was "to protect us from an errant and arrogant bureaucracy. . . ." (110 C.R. 2563.) Even as to the procedural regulations, public hearing was (and is) required. (110 C.R. 2573.)

Under the House bill the EEOC was a prosecutor, just as is the Secretary under the Equal Pay Act. As such the EEOC would have inherent authority to announce its position, but the intent of Congress was that the courts exercise their judgment, *independent* of the administrator. (110 C.R. 2575.)

When the bill reached the Senate, the Senate further narrowed EEOC authority.

After Title VII was adopted however, to create an erroneous *impression* that the EEOC had authority to interpret the law, and in the expectation that "busy federal judges" would defer to such interpretations re-

gardless of their validity,[18] the EEOC "adopted 'guidelines' (since it has no substantive rulemaking power)" (Blumrosen, *infra* at 698). It issues such "guidelines" without any public hearing. Further, for the purpose of developing decisional "law", the EEOC decided to give the "reasonable cause" provision the appearance of a quasi-judicial decision (Blumrosen, *infra* at 733). These efforts are described by one of the architects of this EEOC policy, in Blumrosen, "Administrative Creativity: The First Year of the Equal Employment Opportunity Commission, 38 Geo. Wash. L.Rev. 694 (1970) (Compare Constitution Art. II, §3 which provides that the executive "shall take care that the laws be *faithfully* executed").

A significant additional note is that in 1966, EEOC accurately represented its own authority in its *first* guidelines on testing. That authority was there represented as being "the Commission recommends" and

---

[18]"The choices here were not dictated by statutory language or by legislative history. They were the product of the judgment of the original Commissioners, responding to views developed by a small group of lawyers."
Blumrosen, op. cit. supra at 711.
"My interpretation was received with some incredulity by the other lawyers, who were slowly getting accustomed to my free and easy ways with statutory construction."
Blumrosen, op. cit. supra at 730.
"Thus, the interpretations were basically products of the various attorneys, shaped minimally by extrinsic aids, and leavened by the policy orientation of the Commissioners."
Blumrosen, op. cit. supra at 704.
". . . It seemed likely that busy federal judges would pay considerable attention to the concept of discrimination developed by the Commission through the decisional process. The reasonable cause finding thus became a vehicle for development of the law with respect to discrimination."
Blumrosen, op. cit. supra at 733.

the "Commission advocates" certain things. It was only after certiorari was granted in *Griggs v. Duke Power supra*, that new guidelines on testing were issued (without public notice or input) and the same were attached as an exhibit to a brief. The new format was a *regulation format*, complete with section numbers. It contained EEOC's new "definition" of "discrimination".

Administrative pronouncements of the EEOC and Wage and Hour Administrator are clearly on the same level and entitled to equal weight. But since they are the pronouncements of prosecutors, they may not be used in court *against* the defendant, who is entitled under the statutes to have issues of law and fact determined *de novo* by a court.

IV.

1972 Congressional Action.

The 1972 Congressional action is most significant herein for the things Congress rejected.

Substantially identical bills were introduced in both houses, but the Committees in each house treated them differently.

In the House Committee, a majority approved the original bill; a large minority dissented. In the Senate, major modifications were made in the original bill in the Committee itself.

On the House floor, the Committee bill was defeated; the bill proposed by the minority of the House Committee was adopted in its place. Thus the House Com-

mittee majority report represents views *rejected* in the House; the minority report represents the House intent.

In the Senate, additional major modifications were also made on the Senate floor.

For example, the subsequently rejected House Committee report reflected an intent to recognize peculiar factual expertise or perception in the agency, and to redefine unlawful discrimination.

> "Experts familiar with the subject generally describe the problem in terms of 'systems' and 'effects' rather that simply intentional wrongs. . . . Particularly to the untrained observer their discriminatory nature may not appear obvious at first glance. . . ." House Report No. 92-238, 1972 U.S. Code, Cong., and Adm. News, Vol. 2, p. 2144.

The subsequently rejected Committee majority view thought to transfer affirmative action functions to the EEOC to develop a new definition of discrimination.

> "Clarity, uniformity, and predictability in policy and practice are aided by having the definition of discrimination and the shaping of remedies *developed* by a single agency." (*Id.* at 2150) (emphasis added).

(In the Senate in contrast, it was considered that if this affirmative action program were put under EEOC's roof different standards of the two programs should be kept separate. The Senate decided *not* to join the two *different* approaches in a single agency).

It was also proposed by the majority of the House committee to give the EEOC authority "for issuing basic guidelines to coordinate and give guidance to the compliance program." (*Id.* at p. 2152)

The minority of the House committee whose bill prevailed in the House did not accept the premises of peculiar expertise or of authority to issue guidelines that have standing in court. They stated that their amendments would place the burden on the EEOC as a prosecutor, to prove in a court of law that a defendant who was presumed innocent, had violated the law. (*Id.* at 2157-68) Their view which prevailed was that EEOC "cannot be an impartial arbiter of the law. An advocate, by nature, represents one side of the issue." (*Ibid.*). The floor debates are likewise replete with concern over the bias of the agency.[19]

The Senate likewise decided to make the EEOC a prosecutor.

Of course Congress rejected proposals to delegate to EEOC quasi-legislative and quasi-judicial authority.

As to the possibility of redefining unlawful employment practices (or unlawful discrimination in an employment context), the subsequent Conference Committee made clear that no re-definition was intended or authorized beyond the statutory definition of unlawful employment practices. The Conference Committee Report shows that the legislation provided authority for additional judicial remedies if (but only if) an unlawful employment practice as statutorily defined had been committed. It precluded judicial remedies *unless* such unlawful employment practice as so defined had been committed. Thus the limitation of jurisdiction to the courts under the statute, was intended to preclude a

---

[19]For example, Senator Saxbe said in part, "However, too often we would find—and I speak as a former attorney general who handled the legal aspects of this matter—that in their zealousness to try to protect the civil rights of some people they were also eager to violate the civil rights of others." (118 C.R. 731; 1/21/72). See also 118 C.R. 731, 594, 699, 701.

"common-law making" role or an evolutionary judicial re-definition of what constitutes unlawful discrimination in an employment context. It specifically requires "adverse actions" as defined (and not "effects") be shown and requires that there be an intent to discriminate whether intent is measured by an objective or subjective test in a particular case.

Thus the Conference Committee Report shows that all the major premises of the legislation proposed by the majority of the committee of the House were rejected. The Conference Committee Report says in part:

> "1. The Senate amendment required a finding that the respondent engaged in an unlawful employment practice and the House bill required a finding that respondent 'intentionally' engaged in such unlawful employment practice.
>
> . . .
>
> "4. The House bill restated the provisions of existing law prohibiting court ordered remedies based on any adverse action except unlawful employment practices prohibited under Title VII.
>
> . . .
>
> "The Senate receded with an amendment that provides the following:
>
> "1. A finding that the respondent has intentionally engaged or is intentionally engaging in an unlawful employment practice, as the language of the current law reads.
>
> . . .
>
> "4. The provisions of existing law prohibiting court ordered remedies based on any adverse action except unlawful employment practices under Title VII are retained." (Conference Report, U.S. Cong. & Adm. News (1972) v. 2, p. 2183.)

This action by the Congress in 1972 explicitly reaffirmed the action in 1964.

In 1964, the original legislative proposal permitted the courts to apply remedies unless the action of the employer had been "for cause." This implied a very broad authority in the courts. It also implied that the burden was on the employer to show that the "failure to hire" etc. was for cause.

The House Committee changed the language on the House floor to make clear that actions by the employer "for any reason other" than the prohibited five reasons were *not* unlawful and it is outside the jurisdiction of the court to order remedies unless the employer's was for a prohibited reason. (110 C.R. 2566, 2/8/64.)

When the bill reached the Senate, the Senate added the word "intentional" as a clarifying change. (110 C.R. 12723-4.) Again, as in the House, the view of the *proponents* of the bill was that discrimination was action for a reason and that unlawful discrimination was action for one of the five reasons stated by the statute.[20]

Accordingly, the word "intentional" clarified that meaning; but also precluded judicial expansion of the definition.

By reaffirming those jurisdictional limitations in 1972, Congress reaffirmed the 1964 law.

---

[20]The proponents of the legislation repeatedly pointed out that the word "discrimination" (in an unlawful sense) had a settled legal meaning, as it was used in F.E.P.C. statutes in about half the States, as well as in the National Labor Relations Act, the Interstate Commerce Act, and the Federal Aviation Act. See, e.g. 110 Cong. Rec. 6549, 7218, 5803-4, 5437, 7477.

V.
Legislative Intent vs. Interpretive Bulletin On Employer Costs.

Bulletins issued by the prosecuting agencies (EEOC and Wage and Hour Administrator) are often simply *arguments* for a particular point of view, and here are *contrary* to the statute and not faithful interpretations of the statute at all.

The bulletin relied on in the decision below on rehearing, for example, contradicts the major premise of the statutes it purports to interpret.

The Equal Pay Act says it is unlawful to "discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the wages which he pays wages to employees of the opposite sex . . . except where such payment is made pursuant to . . . a differential based on any other factor other than sex."

The bulletin relied on by the majority below says in part:

> "To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act."

Obviously, the bulletin is not logical nor is it a faithful interpretation of the statute. It is instead a specious argument as to the supposed policy of the statute.

Congress blended several policies in enacting the statute. The administrator may not "legislate" a *single* policy for execution of the statute.

The statute says that if there is another differential factor (sex plus some other factor such as differential cost) differential wages may be paid.

To urge, as the bulletin does that no differentiation upon the basis of sex may be made, even for the purpose of showing the factors of difference between the sexes is tantamount to repeal of the statute.

It is also directly contrary to that portion of Title VII which construes the Equal Pay Act by saying:

> "It shall *not* be an unlawful employment practice . . . for an employer *to differentiate upon the basis of sex* in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by [the Equal Pay Act]."

The bulletin is also contrary to the legislative history on the subject of "costs" as another factor as we have shown.

By stating that certain "defenses" are *not* available, the administrator has re-written the prohibition.

By issuing such "bulletins" or "guidelines" the agency incorrectly stated statutory purposes and meaning. When such bulletins or guidelines are relied on by the courts to hold against defendant, the defendant is thereby deprived of its substantive legal rights as well.

EXHIBIT D.

Charter Sections 220.1(1)(a) and (g).

Sec. 220.1. The Department of Water and Power shall also have the power and duty:

(1) To establish and maintain within said Department a general plan and system of retirement, disability, and death benefits, and, in cooperation with its eligible and participating employees, to provide currently out of the Water Revenue Fund and the Power Revenue Fund a portion of the cost under said plan and system, including expenses incident to the administration thereof, subject, however, to the following provisions, to-wit:

(a) That such plan and system shall be maintained in accordance with sound business practices and recognized actuarial methods, and the respective contributions of said employees and said Department, whether prescribed by present or future provisions of said plan and system, may be modified or adjusted, subject to the direction and approval of the Board of Water and Power Commissioners, whenever the Board of Administration, as hereinafter designated, shall find that said business practices or said actuarial methods require such modification or adjustment;

* * *

(g) That such Board of Administration shall at regular intervals, each not exceeding a period of five years, secure a general survey and actuarial report of said plan and system, and said Board, subject to the direction and approval of the Board of Water and Power Commissioners, shall from time to time amend said plan and system in such manner as may be found to be advisable to meet changed conditions, or, as in the light of experience, may be considered necessary;

* * *

FILED
DEC 23 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977
No. 76-1810

CITY OF LOS ANGELES, *et al.*,

Petitioners,

vs.

MARIE MANHART, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

KENNETH M. SCHWARTZ, Esq.,
LAURENCE D. STEINSAPIR, Esq.,
ROBERT M. DOHRMANN, Esq.,
RICHARD D. SOMMERS, Esq.,
HOWARD M. KNEE, Esq.,
Two Century Plaza, Suite 1900,
2049 Century Park East,
Los Angeles, Calif. 90067,
Attorneys for Respondents.

Of Counsel:
KATHERINE STOLL BURNS, Esq.,
15760 Ventura Boulevard, Suite 601,
Encino, Calif. 91436,

SCHWARTZ, STEINSAPIR, DOHRMANN
& BREPACK,
Two Century Plaza, Suite 1900,
2049 Century Park East,
Los Angeles, Calif. 90067.

Parker & Son, Inc., Law Printers, Los Angeles, Phone 749-4022

SUBJECT INDEX

Page

Question Presented 1

Statement of the Case 2

A. Nature of the Case 2

B. History of the Case 3

Summary of Argument 7

Argument 12

The Mortality Tables Used by Water and Power to Determine Employee Contributions to Its Pension Plan Were Explicitly Sex-Based and Discriminated Against Women in Violation of Title VII 12

A. Water and Power's Pension Plan Discriminated Against Women on Its Face 13

B. Water and Power's Pension Plan Imposed on Women a Substantial Burden That Men Were Not Required to Bear 29

Water and Power's Use of Sex-Segregated Tables Violates Title VII as Interpreted Both by the EEOC and the Department of Labor 36

A. EEOC Guidelines Forbid Employers From Requiring Female Employees to Pay More for Pension Benefits Than Similarly Situated Male Employees 36

B. Labor Department Interpretive Bulletins, Like EEOC Guidelines, Forbid Employers From Requiring Female Employees to Make Larger Pension Contributions Than Similarly Situated Male Employees 42

Page

The Randolph-Humphrey Colloquy Does Not Support Water and Power's Claim That the Bennett Amendment Was Designed to Permit Differential Treatment of Men and Women Under Retirement Plans 49

Respondents Are Entitled Under Title VII to Restitution of the Contributions They Were Illegally Required to Make to Water and Power's Plan 55

Conclusion 60

TABLE OF AUTHORITIES CITED

Cases Page

Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362 (1975) 55, 56

Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971), cert. denied, 404 U.S. 939 (1971) 50, 52, 53

Brennan v. Veterans Cleaning Service, Inc., 482 F. 2d 1362 (5th Cir. 1973) 46

Califano v. Goldfarb, 430 U.S. 198, 97 S.Ct. 1021 (1977) 25, 26, 28, 29, 50

Chastang v. Flynn & Emrich, 541 F.2d 1040 (4th Cir. 1976) 53

Craig v. Boren, 427 U.S. 190, 97 S.Ct. 451 ....18, 24, 25, 26, 27, 29

Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971) 16

Dothard v. Rawlinson, ... U.S. ....., 97 S. Ct. 2720 (1977) 12, 14, 15, 16, 31, 32, 33

Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347 (1974) 58

Fitzpatrick v. Bitzer, 390 F. Supp. 278 (D. Conn. 1974), aff'd on this issue, 519 F.2d 559 (2d Cir. 1975), aff'd in part and rev'd in part on other grounds, 427 U.S. 445, 96 S. Ct. 2666 (1976) 53, 54, 57, 58, 59

Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S.Ct. 1251 (1976) 60

Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764 (1973) 25, 26, 29, 60

Page

Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct. 2485 (1974) 23, 24

General Electric Co. v. Gilbert, 429 U.S. 125, 97 S. Ct. 401 (1976) ..... 6, 22, 23, 24, 26 ..... 27, 28, 29, 35, 36, 54

Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849 (1971) 23, 30, 33, 36

Henderson v. Oregon, 405 F. Supp. 1271, appeal docketed, No. 76-1706 (9th Cir., March 30, 1976) 20, 31

International Brotherhood of Teamsters v. United States, ... U.S. ....., 97 S.Ct. 1843 52

Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717 (1966) 22

Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817 (1967) 24

Mt. Healthy City School Dist. v. Doyle, ... U.S. ...., 97 S.Ct. 568 57

Nashville Gas Co. v. Satty, ... U.S. .... U.S.L.W. ..... (decided Dec. 6, 1977) 12, 29, 30, 35, 38

NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 73 S.Ct. 287 (1953) 41

Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260 (1970) 22

Peters v. Missouri Pacific Railroad Co., 483 F.2d 490 (5th Cir. 1973) 53

Phillips v. Martin Marietta Corp., 400 U.S. 542, 91 S. Ct. 496 (1971) 12, 14, 19, 60

Page

Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971) .. 25

Reilly v. Robertson, 360 N.E.2d 171 (1977) 20, 32

Robinson v. Lorillard, 444 F.2d 791 (5th Cir. 1971), cert. denied 404 U.S. 1006 (1971) 33

Rosen v. Public Service Electric & Gas Co., 328 F. Supp. 454 (D.C.N.J. 1970), remanded 477 F.2d .... (3rd Cir. 1973) 51

Rosen v. Public Service Electric & Gas Co., 409 F.2d 775 (3rd Cir. 1969) 40, 41, 52, 53

Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161 (1944) 36

Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208 (1972) 34

Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976) 30

Weinberger v. Wisenfeld, 420 U.S. 636, 95 S.Ct. 1225 (1975) 25, 26, 27, 29

Wirtz v. Midwest Mfg. Co., 18 WH Cases 556 (S.D. Ill., 1968) 44, 45

Federal Register

30 Federal Register (Dec. 2, 1965), pp. 14926-28.. 38

31 Federal Register (Feb. 11, 1966), p. 2657 44

33 Federal Register (Feb. 24, 1968), p. 3344 39

Miscellaneous

109 Congressional Record 8915 48

109 Congressional Record 9207 (89th Cong. 1963) 47

110 Congressional Record 13663-64, June 12, 1964 50

Page

House Report No. 309 to accompany H. R. 6060, May 20, 1963, Committee on Labor and Education, reprinted in 1963 U.S. Code Cong. & Admin. News 687, 689 (88th Cong., 1st Sess.) 47

Legislative History, pp. 64, 416-417 .....61, 62

Legislative History of the Equal Employment Opportunity Act of 1972 ("Legislative History"), United States Senate (U.S. Gov't. Printing Office, Washington, D.C., 1972) p. 1844 52

Legislative History, p. 1848 55

Senate Report No. 92-415, 92d Cong., 1st Sess., p. 5 .....39, 62

Regulations

Code of Federal Regulations, Title 29, Sec. 800.116 (d) 41, 44

Code of Federal Regulations, Title 29, Sec. 800.151 44

Code of Federal Regulations, Title 29, Sec. 1604.7 (b) 41

Code of Federal Regulations, Title 29, Sec. 1604.9 (b) 3, 36, 55

Code of Federal Regulations, Title 29, Sec. 1604.9 (e) 3, 37, 55

Code of Federal Regulations, Title 29, Sec. 1604.9 (f) 3, 9, 10, 36, 55

Code of Federal Regulations, Title 29, Secs. 800.-119-800.163 .....41, 44

Rules

Page

Federal Rules of Evidence, Rule 201 20

Statutes

California Constitution, Art. I, Sec. 1 4

California Constitution, Art. I, Sec. 7(d) 4

California Constitution, Art. I, Sec. 21 4

Civil Rights Act of 1964, Sec. 703(a) 13, 15

Civil Rights Act of 1964, Sec. 703(a)(1) 7, 12, 60

Civil Rights Act of 1964, Sec. 703(a)(2) 7, 12, 60

Civil Rights Act of 1964, Sec. 703(e) 15, 16

Civil Rights Act of 1964, Sec. 703(h) 10, 42

Equal Pay Act of 1964, Sec. 6(d) 54

Equal Pay Act of 1964, Sec. 6(d)(1) 42

Government Code, Sec. 7500 .....5, 21

Los Angeles City Charter, Sec. 220.1 3

Los Angeles City Charter, Sec. 220.1(f) 4, 59

United States Code, Title 28, Sec. 1331 5

United States Code, Title 28, Sec. 1343(3) 5

United States Code, Title 28, Sec. 1343(4) 5

United States Code, Title 28, Sec. 2201 5

United States Code, Title 28, Sec. 2202 5

United States Code, Title 29, Sec. 206(d) 10, 42, 43

United States Code, Title 29, Sec. 206(d)(1) 42, 47, 49

United States Code, Title 29, Sec. 206(d)(1)(i)-(iii) 46

United States Code, Title 29, Sec. 206(d)(1)(iv) 10, 46

Page

United States Code, Title 29, Sec. 623(h)(2) 21
United States Code, Title 42, Sec. 401(a) 51
United States Code, Title 42, Sec. 1983 .....4, 6
United States Code, Title 42, Sec. 2000e-2 1
United States Code, Title 42, Sec. 2000e-2(a)(1) 2, 4, 12
United States Code, Title 42, Sec. 2000e-2(a)(2) 2, 4, 12
United States Code, Title 42, Sec. 2000e-2(h) 42
United States Code, Title 42, Sec. 2000e-4 36
United States Constitution, Fifth Amemdment 30
United States Constitution, Eleventh Amendment 11, 57, 58
United States Constitution, Fourteenth Amendment 4, 8, 22, 23, 24, 25, 30
United States Constitution, Fourteenth Amendment, Sec. 5 22
Voting Rights Act of 1965, Sec. 4(e) 22

Textbooks

Bernstein, M. and L. Williams, "Title VII and the Problems of Sex Classifications in Pension Programs," 74 Col. L. Rev., p. 1218 51
Bureau of Economics, Federal Trade Commission, Price Variability in the Automobile Insurance Market (Dep't of Transportation, Automobile Insurance and Compensation Study, 1970), p. 255.. 19
Gold, M., "Equality of Opportunity in Retirement Funds," 9 Loyola L. Rev. 596, 602 (1976) 51

Page

Jordan, C. W., Life Contingencies (Transactions of the Society of Actuaries 1975), p. 57 18
Martin, G., "Gender Discrimination in Pension Plans," Journal of Risk and Insurance, Vol. XLIII, No. 2 (June 1976), pp. 203-214 20
Note, Developments in the Law: Employment Discrimination in Title VII of the Civil Rights Act of 1964, 84 Harvard Law Review, pp. 1109, 1173, 1174 .....19, 51
Note, Sex Discrimination and Sex-Based Mortality Tables, 53 B. U. Law Review (1973), p. 624, n. 2 33
Wage and Hour Manual, 95:607 (BNA 1964) 43
Wynn, S., World Trends In Life Insurance (John Wiley & Sons 1975), pp. 42-43 .....17, 18

IN THE

Supreme Court of the United States

October Term, 1977
No. 76-1810

CITY OF LOS ANGELES, *et al.*,

Petitioners,

vs.

MARIE MANHART, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

QUESTION PRESENTED.

The question presented in this case is whether a retirement plan which requires women employees to contribute from their wages nearly 15% more than similarly situated male employees because of the longer average life expectancy of women violates the Civil Rights Act of 1964, Title VII, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-2.

STATEMENT OF THE CASE.

A. Nature of the Case.

This is a class suit by female employees of the Los Angeles Department of Water and Power ("Water and Power") who are participating, or who have participated, in the Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan ("Pension Plan" or "Plan"). Respondents are contending that the Plan's use of sex-segregated mortality tables to determine employee contribution rates violated various federal statutes, including Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§2000e-2(a)(1), (2)), and the United States and California Constitutions. Suit was brought on September 26, 1973 against Water and Power, Members of the Board of Water and Power Commissioners ("Commissioners") and Members of the Board of Administration of Water and Power's Plan ("Plan Administrators") (R. 1).[1]

Because the Plan's tables purported to show that women as a class live longer than men, Water and Power required its female employees to contribute approximately 15% more to the Plan than their male counterparts to receive the same benefits. Accordingly, Respondents sought an injunction ordering Petitioners to equalize male and female contribution rates under the Plan and to grant class members restitution of money they were illegally forced to contribute to the Plan in excess of contributions made by similarly situated male employees (R. 18).

The District Court permanently enjoined Petitioners under Title VII from requiring female Water and Power employees to make larger contributions to the Plan

[1]"R" refers to the record on appeal in this case.

than their male counterparts. The Court further awarded class members a refund of illegally required contributions made on and after April 5, 1972 (R. 369).[2] The Court of Appeals affirmed this decision and denied defendants a rehearing *in banc*.

B. History of the Case.

Respondents Mayshack, Stoop, Muller and Lehman are female employees of Water and Power. Respondent Manhart, also a female, is a former employee of Water and Power, now retired. The Committee to Protect Women's Retirement Benefits is an association of female supervisory employees of Water and Power. The International Brotherhood of Electrical Workers, Local Union No. 18 ("IBEW") is an unincorporated labor organization whose members include certain women employed by Water and Power (R. 12-15).

Water and Power employs or has employed approximately 2,500 women who are participating or have participated in its Plan (R. 12). The Plan Administrators administer the Plan and the Commissioners have final responsibility for making decisions concerning operation of the Plan (R. 15-16). Water and Power is required to maintain the Plan for its employees under Los Angeles City Charter, Section 220.1.

Water and Power's Plan is contributory, *i.e.*, it is funded in part by employee contributions, and participation is mandatory for all Water and Power employees (R. 173). The Plan used sex-segregated mortality tables to determine employee contribution rates. Because these

[2]On April 5, 1972, the Equal Employment Opportunity Commission issued guidelines prohibiting contribution rate differentials based on sex in employee benefit plans. 29 C.F.R. 1604.9 (b), (e), (f). See *infra*.

tables purport to show that women as a class live longer than men, women are required to contribute 14.84% more to the Plan than male employees entering the Plan at the same age (R. 173, 311-312). Thus, for example, Ms. Manhart paid over $5,000 more to the Plan from 1950 to her retirement than her male counterpart (R. 176).

Money contributed to the Plan is required by Los Angeles City Charter, Section 220.1(f) to "be kept separate and apart from all other money on deposit with the City Treasurer." Water and Power's chief accounting employee (who is also the chief accounting employee for the Plan Administrators) is the only person authorized to withdraw money from the Plan.

IBEW, on or about June 5, 1973, filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging that Water and Power's Plan discriminated against female Water and Power employees because it required them to contribute more to the Plan than their male counterparts. The United States Department of Justice issued Respondents a Notice of Right to Sue letter on or about September 17, 1973 (R. 12). Respondents filed their complaint in Federal Court on September 26, 1973.

Respondents alleged in their complaint that Water and Power's use of sex-segregated mortality tables to determine employee contribution rates to the Plan violated Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e-2(a)(1), (2)), the Civil Rights Act of 1871 (42 U.S.C. §1983), the Fourteenth Amendment to the United States Constitution, and Article I, Sections 1 and 21 of the California Constitution (Section 21 is now embodied in Section 7(d))

(R. 13). Jurisdiction is asserted under 28 U.S.C. §§1331, 1343(3), 1343(4), 2201 and 2202. The amount in controversy exceeds $10,000 (R. 12).

On January 15, 1975, the District Court issued a preliminary injunction prohibiting Water and Power from requiring larger contributions to the Plan from individual female employees than from similarly situated individual male employees. After an analysis of existing case law and other authorities, the Court held that "sexual discrimination under Section 703(a)(1) [42 U.S.C. §2000e-2(a)(1)] exists whenever general fact characteristics of a sex-defined class are automatically applied to an individual within that class." It concluded that Water and Power violated Title VII "by applying the general actuarial characteristic of female longevity to individual female employees who in reality may or may not outlive individual male employees." (R. 323).

On December 26, 1974, while the Court's opinion was in draft form, Petitioners notified the Court that they "had adopted a resolution on December 23, 1974, equalizing male and female contributions to the Retirement Plan." (R. 326). The resolution was effective January 1, 1975. Also effective on and after January 1, 1975, the California Legislature in Government Code, Section 7500 made it unlawful for a municipal pension and retirement system to require greater contributions from employees of one sex than from employees of another sex who are the same age.

The District Court issued a permanent injunction on June 20, 1975, enjoining Water and Power from requiring female employees to make larger contributions to the Plan than their male counterparts. The Court

also ordered Water and Power to refund to class members, with 7% interest, contributions female employees were required to make to the Plan in excess of contributions required from similarly situated male employees on and after April 5, 1972 (R. 369). On April 5, 1972, the EEOC issued guidelines prohibiting contribution rate differentials based on sex in employee benefit plans.[3]

The Court of Appeals affirmed the judgment of the District Court with respect to Respondents' cause of action under Title VII on November 23, 1976. On December 7, 1976, Petitioners filed a Petition for Rehearing and Suggestion that Rehearing be *In Banc*. That same day, this Court decided *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S. Ct. 401 (1976). The Court of Appeals, following a second analysis of the instant action, found that *Gilbert* did not require a change in its judgment and denied Petitioners' Petition on April 18, 1977. The Court found that the mortality tables used by Water and Power were explicitly sex-based and discriminated against women in violation of Title VII. It stated:

> "A greater amount is deducted from the wages of every woman employee than from the wages of every man employee whose rate of pay is

[3]The District Court earlier dismissed Respondents' cause of action under 42 U.S.C. §1983 on the ground that the Commissioners and Plan Administrators in their official or representative capacities were not persons within the meaning of Section 1983 (R. 121). This deprived Respondents of the benefit of the three-year statute of limitations applicable to Section 1983 actions and prevented class members from receiving a refund of illegally required excess contributions made to the Plan between September 26, 1970 and April 5, 1972. The Court of Appeals, however, found that this order was interlocutory and refused jurisdiction. Like Respondents' other causes of action, it is still pending before the District Court.

> the same. How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a whole, longevity, and it disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that the difference is not based on sex is to play with words." 553 F.2d at 593.

On or about June 20, 1977, Petitioners petitioned this Court for a Writ of Certiorari directed to the Court of Appeals. The Petition was granted on October 12, 1977.

SUMMARY OF ARGUMENT.

Water and Power used sex-segregated mortality tables to determine employee contributions to its Plan. The tables, although designed to predict longevity, did not use other more relevant factors affecting longevity, such as smoking and drinking habits, normality of weight, prior medical history and family longevity history. Because the tables showed that women as a class live longer than men, Water and Power required its female employees to contribute approximately 15% more to the Plan than their male counterparts to receive the same benefits. Respondents submit that this practice violated Sections 703(a)(1) and (a)(2) of the Civil Rights Act of 1964, as amended.

There are two tests for establishing a *prima facie* case of employment discrimination under Title VII: (1) Is the classification discriminatory on its face; or, if it is not, (2) is the classification discriminatory in its impact? Water and Power's Plan, without suf-

ficient justification, discriminated against women under both these tests.

Once a *prima facie* case of explicit sex-based discrimination is established, the employer has the burden of justifying its classification as a *bona fide* occupational qualification ("BFOQ"). The BFOQ defense, however, is only available in cases involving discrimination in hiring. Thus, although Water and Power's use of sex-segregated tables is explicitly sex-based, it is not protected from Title VII's anti-discrimination mandate under the BFOQ exemption. In any event, even if the BFOQ defense could be applied outside the scope of hiring, Water and Power's rationale for using sex-segregated tables does not meet the BFOQ test.

The Court has suggested that in some instances a Fourteenth Amendment analysis may be helpful in determining whether a practice is discriminatory under Title VII. Because the instant case involves an explicit sex-based classification, however, the threshold determination that Water and Power's practice was discriminatory cannot be disputed. A Fourteenth Amendment approach also is inapposite to the instant case because it would provide greater protection under Title VII to blacks than to women, a result clearly not contemplated by Congress.

Nevertheless, Water and Power's use of sex-segregated tables also was discriminatory under the Fourteenth Amendment. In fact, the instant case presents an equal protection question considered in a long line of Fourteenth Amendment cases invalidating statutes which employed gender as an inaccurate substitute for other and more relevant bases of classification. These cases have refused to attribute group sex characteristics to individual women (or men) where there was a weak congruence between sex and the characteristic or where it would violate the intent of Title VII that persons of like qualifications be treated alike.

Water and Power's Plan also discriminated against women in its impact. Because women as a class live longer than men, Water and Power required female employees to contribute more from their wages than similarly situated male employees. The result was that these women had less discretionary income to provide for themselves and their families and were burdened to an extent men were not. For example, Marie Manhart contributed over $5,000 more than her male counterpart during her employment with Water and Power.

Water and Power cannot justify its use of sex-segregated tables as a business necessity. Not only does this practice serve no business purpose, but two alternative methods of predicting longevity which are not based solely on sex are available: the sex-neutral table and the multi-factor table. The sex-neutral table pools the risk of longevity associated with sex among all covered employees in the same manner as other longevity risks already are pooled; the multi-factor table is based on a variety of factors which affect longevity.

Water and Power's use of sex-segregated tables violated Title VII as interpreted both by the EEOC and the Labor Department. The EEOC, established by Congress to enforce the anti-discrimination mandate of Title VII, has issued guidelines specifically making it an unlawful employment practice for an employer "to have a pension or retirement plan which differentiates in benefits on the basis of sex." 29 CFR §1604.9

(f). The EEOC applied its guidelines to a case identical to the instant case and struck down the employer's practice as unlawful.

Title VII is tied to the Equal Pay Act through Section 703(h). This section, popularly known as the Bennett Amendment, provides that it shall not be an unlawful employment practice for an employer to treat men and women differently "if such differentiation is authorized by the provisions of section 206(d) of the Equal Pay Act." Section 206(d) permits, among other things, "a differential based on any other factor other than sex. . . ." Section 206(d)(1)(iv).

The Labor Department has always maintained that sex-based wage differentials, to qualify under Section 206(d)(1)(iv), must reflect all employment costs and not just a selected few. Thus, it has struck down wage differentials based on data showing that pension and other benefits cost more per hour for women than for men. The Labor Department's position is set forth in an Interpretive Bulletin and various other rulings.

Senator Humphrey's remark that the Bennett Amendment was intended to permit differences of treatment in industrial benefit plans, including earlier retirement options for women, does not support Water and Power in the instant case. Viewed in context, Senator Humphrey never intended his remarks to be construed as permitting differences in retirement plans that discriminated *against* women. To the contrary, Senator Humphrey believed that since Title VII was designed to improve the employment status of women, it should not be used to undermine existing practices designed to achieve that same result. In any event, when Congress

amended Title VII in 1972 it explicitly adopted existing case law which included two decisions invalidating differential retirement ages under Title VII.

Respondents are entitled to restitution of the contributions they were illegally required to make to Water and Power's Plan. This remedy is in accord with the purpose of Title VII to make persons whole for injuries suffered by reason of unlawful employment discrimination. Neither a good-faith defense nor the doctrine of sovereign immunity contained in the Eleventh Amendment can defeat Respondents' right to a refund of these contributions.

ARGUMENT.

THE MORTALITY TABLES USED BY WATER AND POWER TO DETERMINE EMPLOYEE CONTRIBUTIONS TO ITS PENSION PLAN WERE EXPLICITLY SEX-BASED AND DISCRIMINATED AGAINST WOMEN IN VIOLATION OF TITLE VII.

Sections 703(a)(1) and (a)(2) of Title VII provide:

> "It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex; or
>
> (2) to limit, segregate or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex. . . ." (42 U.S.C. §§2000e-2(a)(1), (2).)

The Court, in a consistent line of Title VII cases, has set forth two tests for establishing a *prima facie* case of employment discrimination:

(1) Is the classification discriminatory on its face? *Dothard v. Rawlinson,* ..... U.S. ....., 97 S. Ct. 2720 (1977); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 91 S. Ct. 496 (1971); *or,* if it is not,

(2) Is the classification discriminatory in its impact? *Nashville Gas Co. v. Satty,* ..... U.S. ....., ... U.S.L.W. ..... (decided December 6, 1977); *Dothard v. Rawlinson, supra.*

A. Water and Power's Pension Plan Discriminated Against Women on Its Face.

Water and Power, until January 1, 1975, used mortality tables based wholly and explicitly on sex to determine employee contributions to its Pension Plan. The tables simply divided employees into two groups—male and female. Based on this classification, Water and Power required women to contribute nearly 15% more to the Plan than similarly situated men in order to receive the same monthly benefits. For example, Marie Manhart and Frances Nouse, two retired employees, contributed over $5,000 and $6,000 more than their male counterparts, respectively, during their employment at Water and Power (R. 176).[4]

Water and Power's contention that its tables were not really based on sex, but rather on longevity, is a transparent attempt to avoid the fact that it has used an explicitly sex-based classification in violation of Section 703(a). Thus, other more relevant factors affecting longevity, such as smoking and drinking habits, normality of weight, prior medical history and family longevity history, were not used in determining contribution rates. The Court of Appeals recognized this obvious contradiction and rested its decision on the fact that Water and Power's classification scheme was explicitly sex-based:

---

[4]During their employment with Water and Power, Manhart and Nouse contributed $17,303.75 and $19,323.24, respectively, to its Plan. Their male counterparts contributed $12,229.61 and $13,073.98 for a difference of $5,074.14 and $6,249.26 (R. 176). The record also reflects that Thelma Clark contributed $4,822.69 more than her male counterpart; Geraldine Green $5,837.87 more than her counterpart; Joan Roberts $5,396.04 more than her counterpart; and Mary M. Sullivan $5,963.72 more than her counterpart (R. 176).

> "A greater amount is deducted from the wages of every woman employee than from the wages of every man employee whose rate of pay is the same. How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a whole, longevity, and it disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that the difference is not based on sex is to play with words." 553 F.2d at 593.

The Court has considered explicitly sex-based classifications in only two Title VII cases, *Dothard v. Rawlinson, supra,* and *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496 (1971). *Dothard* involved various regulations of the Alabama Board of Corrections, one of which prohibited the assignment of women correctional counselors to "contact positions" in maximum security institutions, *i.e.,* positions requiring continual close physical proximity to inmates. (The other regulations at issue in *Dothard* are discussed *infra.*) In *Phillips,* a private employer refused to accept employment applications from women with pre-school age children, although it accepted applications from similarly situated men.[5]

In both *Dothard* and *Phillips,* the Court, after exposing the classification schemes as sex-based, placed the burden on the employer to justify its use of gender

[5]The same Title VII principles apply to both public and private employers. *Dothard v. Rawlinson,* .... U.S. at ...., 97 S.Ct. at 2728, n. 14.

criteria under the BFOQ defense. Likewise, because Water and Power's classification scheme was sex-based, it too must justify its practice under Section 703(e). This it has not done and cannot do.

The BFOQ defense is found in Section 703(e) of Title VII. It provides that:

> "It shall not be an unlawful employment practice for an employer to hire and employ an employee on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

A comparison of Section 703(e) with Section 703(a) reveals that the scope of the BFOQ defense does not parallel the scope of unlawful conduct. Indeed, Section 703(a) defines prohibited conduct as broadly as one can imagine. It makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, *or otherwise to discriminate against any individual*" on the basis of sex or "*to limit, segregate or classify*" employees in any way which would deprive a person of equal employment opportunities on the basis of sex.

Section 703(e), on the other hand, is very narrowly drafted. It permits the BFOQ defense only when an employer "hire[s]" or "employ[s]" an individual because of his or her sex. The Court in *Dothard* recognized the inherent limitation of the BFOQ defense and adopted "the virtually uniform view of the federal

courts that Section 703(e) provides only the narrowest of exceptions to the general rule requiring equality in employment opportunities." .... U.S. at ...., 97 S.Ct. at 2728. It stated:

> "We are persuaded—by the restrictive language of §703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the BFOQ exception was, in fact, meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." (Footnote omitted.) .... U.S. at ...., 97 S.Ct. at 2727.

The *Dothard* Court quoted with approval the formulation of the BFOQ defense set forth in *Diaz v. Pan American World Airways,* 442 F.2d 385 (5th Cir. 1971). This formulation, *which extends only to hiring practices,* admonishes that:

> "[D]iscrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." (Emphasis in original.) 442 F.2d at 388.

Water and Power's use of sex-segregated tables to determine employee contributions to its Pension Plan does not impact on hiring practices nor are the tables even remotely related to the essence of Water and Power's business operation, *i.e.,* to provide water and power to residents of the City of Los Angeles. In any event, as the Court of Appeals stated:

> "Even if it could be said that the relevant business function here involved is that of providing employees with a stable and secure pension program, there is no showing that sexual discrimination is necessary to protect the essence of that function. Actuarial distinctions arguably enhance the ability of the employer and pension administrators to predict costs and benefits, *but it cannot be said that providing a financially sound pension plan requires an actuarial classification based wholly on sex.*" (Emphasis added.) 553 F.2d at 587.

The Court of Appeals suggested as an alternative mortality tables that reflect a variety of factors affecting longevity. Since it is axiomatic that the more comprehensive the data, the more reliable the prediction, Water and Power cannot complain that the fiscal integrity of its Plan would be threatened. Mortality tables based on other criteria such as smoking and drinking habits, normality of weight, prior medical history and family longevity history, would more accurately predict longevity and enable Water and Power to more intelligently fund its pension system.

A second alternative available to Water and Power, if the multi-factor table proves administratively unfeasible, is the sex-neutral table. This table pools the risk of longevity associated with sex in the same manner as Water and Power's tables now pool the risk of longevity associated with factors other than sex. For example, although it can be predicted that as a class non-smokers outlive smokers, the risk of longevity associated with non-smokers is distributed over all members of the covered group. Indeed, this is the very nature of group insurance. As stated in *World Trends In Life Insurance*:

> "Group schemes reduce the importance of mortality tables in the calculation of premiums. For large schemes containing thousands of people a

very approximate knowledge of ages is adequate. It can suffice to know that the group is not noticeably ageing and that there are a reasonable number of new entrants in the lower age groups. As the size of the group increases the previous claims experience becomes more important than mortality assumptions based on mortality tables." S. Wynn, *World Trends In Life Insurance* at pages 42-43 (John Wiley & Sons 1975).[6]

The issue in the instant case, therefore, is what risks Water and Power ought to be required to pool in order to determine longevity. The resolution of this issue, however, cannot be determined solely by reference to actuarial facts. *Certain classifications which may be feasible from an actuarial standpoint may be barred for reasons of social policy.* Thus, as pointed out on page 11 of the Amicus Brief of the Society of Actuaries and the American Academy of Actuaries, "black persons exhibit shorter longevity than white persons, but they are not charged a lower amount when they purchase annuities or a higher amount when they purchase life insurance."[7] When Congress enacted Title VII, it declared that "persons of like qualifications be given

---

[6]Mortality tables and claims experience are not the only elements used to determine the fiscal soundness of a pension plan. Thus, the assumed rate of return on investments is equally important in computing the present value of the fund. It is axiomatic that an increase in mortality rates can be offset by a like increase in the assumed rate of interest. C. W. Jordan, *Life Contingencies* at page 57 (Transactions of the Society of Actuaries 1975). Thus, an increase of 15% in mortality rates can be compensated for by a 15% increase above the present assumed rate of return.

[7]The "unfairness and questionable constitutionality" of this kind of classification was stated in *Craig v. Boren,* 427 U.S. 190, 208, n. 22, 97 S.Ct. 451, 463, where the Court commented on the statistical relationship between alcohol abuse and certain racial and ethnic minorities.

employment opportunities irrespective of their sex." *Phillips v. Martin Marietta Corp.,* 400 U.S. at 544, 91 S. Ct. at 497-498. By making this determination, it foreclosed the actuarial option of using sex as an indicator of longevity if that would deny a woman the same employment benefits as a similarly situated man because of her sex.

Longevity is not the only characteristic associated with sex. For example, automobile insurance statistics show that women are safer drivers than men. See, *e.g.,* Bureau of Economics, Federal Trade Commission, Price Variability in the Automobile Insurance Market 255 (Dep't of Transportation, Automobile Insurance and Compensation Study, 1970). However, as one commentator stated:

"[A] trucking company could not refuse to hire men on the theory that they are, on the whole, less safe drivers. A ban on sex discrimination must mean that attributes of one sex cannot be used to burden any single employee who may not share that attribute. Since some men are safe drivers, and some women are not, this type of policy constitutes explicit sex discrimination. The employer is not, strictly speaking, hiring only safe drivers; he is hiring only women safe drivers." Note Developments in the Law: Employment Discrimination in Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev., 1109, 1174.

The inequity of using sex-segregated tables to determine longevity is highlighted by the fact that nearly five out of six women share common death ages with their male counterparts:

"The great majority of men and women—84 per cent—share common death ages. That is, for every

> woman who dies at 81 there is a corresponding man who dies at 81. The remaining 16 per cent are women who live longer than the majority and men who live shorter. As a result, each woman is penalized because a few women live longer and each man benefits because a few men die earlier." *Henderson v. Oregon,* 405 F. Supp. 1271, 1277, n.5, appeal docketed, No. 76-1706 (9th Cir., March 30, 1976).[8]

What Water and Power has done, therefore, is to spread the risk of longevity associated with every sixth woman among a class comprised solely of women, 84% of whom will die at the same age as their male counterparts. Thus, out of a class of 1,000 males and 1,000 similarly situated females, 840 men and women will die at the same age. Nevertheless, these 840 women are penalized by the 160 women who are blessed with longevity and, equally important, these 840 men will receive a windfall.[9] Water and Power's

---

[8]There is no evidence before the Court concerning the common death ages of men and women. However, two courts, a Federal District Court in Oregon and the Indiana State Supreme Court, respectively found that 84% and 82.9% of men and women live to the same age. *Henderson v. Oregon, supra,* and *Reilly v. Robertson,* 360 N.E.2d 171 (1977). An explanation of this overlap in death ages appears in G. Martin, "Gender Discrimination in Pension Plans," Journal of Risk and Insurance, Vol. XLIII, No. 2, at pages 203-214 (June 1976). Respondents respectfully request that the Court take judicial notice of this fact pursuant to Rule 201 of the Federal Rules of Evidence.

[9]The suggestion of TIAA-CREF on page 25, note ** of its Amicus Brief that pairing male and female death ages "establishes nothing more than any two groups in different risk classifications may be 'overlapped'" is not helpful in the instant case. The simple fact, not disputed by TIAA-CREF, is that 84% of men and women share common death ages. Since the present action concerns the use of sex-segregated tables to determine the life span of groups of individuals, any other pairing, *e.g.*, according to the order in which each person

position is that since it is impossible to predict when a particular individual will die, it will penalize only women because as a class they live longer than men.

The feasibility of sex-neutral tables has been aptly demonstrated by Water and Power's own experience during the nearly three years it has operated under such tables. Thus, there is nothing in the record, nor has Water and Power sought to augment the record, to support the doomsday predictions of financial ruin contained in its Brief. In fact, Water and Power's pension system is running smoothly without the use of sex-segregated tables and it will continue to do so regardless of the Court's decision. Effective on and after January 1, 1975, the California Legislature in Government Code, Section 7500 made it unlawful for a municipal pension and retirement system to require "employees of one sex to pay greater contributions than those of another sex who are the same age."[10]

---

dies, is of no value. That a similar overlap of death ages occurs between a group of women aged 65 and a group of women aged 60 also is inapposite. The Age Discrimination Act of 1967 specifically excludes retirement plans (29 U.S.C. §623(h)(2)).

[10]The Amicus Brief of the Society of Actuaries and the American Academy of Actuaries refutes the claim of other amici that a decision affirming the Court of Appeals would cause financial problems for other pension plans across the nation. At page 18, it states that:

> "Most defined benefit plans are noncontributory, but a substantial minority requires employee contributions. Employee contributions are almost always—unlike the plan in the case at bar—unrelated to age or sex. To the extent that employee contributions are related to age or sex, they are found in plans adopted by governmental bodies and not by private institutions. . . .
>
> "Since defined benefit plans which provide for different contribution rates for male and female employees are exceedingly rare, there would not be a widespread effect if equal employee contribution rates were to be required in the case at bar."

Water and Power has not attacked this statute in Court.

In sum, the BFOQ defense is not available to Water and Power in the case at bench. Under Title VII principles, its use of sex-segregated tables was unlawful.

The Court in *General Electric Co. v. Gilbert, supra,* suggested, because of the similarities between the language used by Congress in Title VII and in various decisions construing the Equal Protection Clause of the Fourteenth Amendment, "that the latter are a useful starting point in interpreting the former." 429 U.S. at 133, 97 S. Ct. at 407.[11] This comparison was

[11]The argument advanced by Water and Power that Congress' enforcement powers under Section 5 of the Fourteenth Amendment may not go beyond judicial standards construing the Amendment was disposed of in *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717 (1966). In upholding Section 4(e) of the Voting Rights Act of 1965, which invalidated literacy requirements affecting the right of certain Puerto Ricans to vote, the Court stated:

> "The Attorney General of the State of New York argues that an exercise of congressional power under §5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that §4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by §4(e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of §5 supports such a construction." (Footnote omitted.) 384 U.S. at 648, 86 S.Ct. at 1722.

The Court went on to hold that under Section 5 Congress has the power to pass all laws appropriate to enforce the prohibitions of the Amendment. Any other rule, the Court said, "would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment." (Footnote omitted.) *Id.* See also *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. at 260 (1970). Title VII is appropriate to enforce the anti-discrimination mandate of the Fourteenth

helpful in *Gilbert* for a significant reason that is inapplicable to the instant case. Since the classification in *Gilbert* did not discriminate against women on its face, the Court first had to determine the threshold question of whether General Electric's policy was discriminatory in its impact. Thus, it turned to its earlier decision in *Geduldig v. Aiello,* 417 U.S. 484, 94 S. Ct. at 2485 (1974), where it had considered an identical claim under the Fourteenth Amendment, to ascertain "what the concept of discrimination has traditionally meant." 429 U.S. at 145, 97 S. Ct. at 412.[12] However, the Court was very careful to point out that "there is no necessary inference that Congress, in choosing this language [of Section 703(a)(1)], intended to incorporate into Title VII the concepts of discrimination which evolved from Court decisions construing the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 133, 97 S. Ct. at 407.

The instant case, unlike *Gilbert,* concerns explicit sex discrimination rather than disparate impact. The fact that Water and Power's use of sex-segregated tables discriminates against women cannot be disputed. The real controversy is whether Water and Power can justify

Amendment in the employment arena. Because of the multiplicity of employment practices which, although facially neutral, discriminate against women, see, *e.g., Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849 (1971), an interpretation of Title VII which requires a showing of discriminatory intent would render it virtually meaningless.

[12]The Court in *Gilbert,* quoting from *Geduldig,* agreed that "[t]he program divides potential recipients into two groups—pregnant women and non-pregnant persons." 429 U.S. at 135, 97 S.Ct. at 407. The Court concluded that "the quoted language from *Geduldig* leaves no doubt that our reason for rejecting appellee's equal protection claim in that case was that the exclusion of pregnancy from coverage under California's disability benefits plan *was not in itself discrimination based on sex.*" (Emphasis added.) *Id.*

its use of these tables under the BFOQ defense. In short, the rationale used to connect *Gilbert* with *Geduldig* cannot be used to connect the instant case with cases decided under the Fourteenth Amendment.

A Fourteenth Amendment approach also is inappropriate for another reason: The judicial standard of scrutiny under the Equal Protection Clause is closer for blacks than for women. Compare *Loving v. Virginia,* 388 U.S. 1, 87 S. Ct. 1817 (1967) with *Craig v. Boren, supra. Title VII, however, except for the BFOQ exception, does not distinguish between these two protected groups.* Thus, under a Fourteenth Amendment analysis, women would be placed in the anomalous position of receiving less protection under Title VII than blacks, a result clearly not contemplated by Congress when it enacted Title VII.

For these reasons, Respondents submit that resort to the Fourteenth Amendment would not be helpful in the instant case. Nevertheless, because Water and Power's practice was so arbitrarily discriminatory and without justification, it cannot be validated under any test, constitutional or statutory. With this caveat, Respondents submit the following Fourteenth Amendment analysis as an *additional rationale* for striking down Water and Power's practice as discriminatory.

Water and Power relied solely on sex, as an inaccurate substitute for length of life, to determine employee pension plan contributions and ignored other more relevant factors affecting longevity. Some of these were mentioned by the Court of Appeals, *i.e.,* smoking and drinking habits, normality of weight, prior medical history and family longevity history. Viewed in this light the instant case presents an equal protection question considered in a long line of Fourteenth Amendment cases invalidating statutes which employed gender as an inaccurate substitute for other and more relevant bases of classification. *Califano v. Goldfarb,* 430 U.S. 198, 97 S. Ct. 1021 (1977); *Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451 (1976); *Weinberger v. Wisenfeld,* 420 U.S. 636, 95 S. Ct. 1225 (1975); *Frontiero v. Richardson,* 411 U.S. 677, 93 S. Ct. 1764 (1973); and *Reed v. Reed,* 404 U.S. 71, 92 S. Ct. 251 (1971).

In *Reed,* the Court considered a statute providing that where two persons were otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female applicant. The assumption underlying this preference was that men as a rule are more conversant with business affairs than women and therefore, all other factors being equal, would make better administrators. The statutory objective was to eliminate contests in order to reduce the workload on probate courts and minimize intra-family conflict.

The Court in *Reed* recognized that the state's interest in achieving administrative efficiency "is not without some legitimacy." Nevertheless, it concluded that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intra-family controversy, the choice in this context may not lawfully be mandated solely on the basis of sex." 404 U.S. at 76-77, 92 S. Ct. at 254.

Weinberger and *Califano* involved social security statutes providing benefits to surviving widows with children and to widows, respectively, but not to surviving widowers with children nor to widowers who received less than one-half of their support from their deceased wives. The statute in *Frontiero* granted spousal benefits to servicemen but not to servicewomen unless they provided more than one-half of their husband's support.

These statutes each rested on the notion that men were more likely than women to be the primary supporters of their spouses and/or their children. Although the Court in *Weinberger* found that this assumption "is not entirely without empirical support," 420 U.S. at 642, 95 S. Ct. at 1230, it nevertheless struck down both statutory schemes. "Benefits," the Court held, "must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex." *Id.* at 647, 95 S. Ct. at 1238. The statistically valid fact that more men than women are family breadwinners did not provide this justification.

The statutes at issue in *Craig* rested on a different assumption than in the above cases. At issue was an Oklahoma scheme prohibiting the sale of "non-intoxicating" 3.2% beer to males under the age of twenty-one and to females under the age of eighteen. The legislative assumption underlying this scheme was that males were more prone to "driving under the influence" and "drunkenness" than females. 429 U.S. at 200, 97 S. Ct. at 458. Although Oklahoma presented a flood of statistics to support its disparate treatment of men and women, the Court held the statutes unconstitutional. Its decision rested on (1) the normative philosophy of the equal protection clause that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of these objectives," 429 U.S. at 197, 97 S. Ct. at 457, and (2) the "weak congruence between gender and the characteristic or trait that gender purported to represent." 429 U.S. at 199, 97 S. Ct. at 458.

The instant case, like the cases cited above, presents a situation where, as a matter of administrative convenience and bureaucratic momentum, an explicitly sex-based classification was used in place of other more accurate and relevant factors for determining longevity. Similar to applying sexual stereotypes concerning female dependency or overbroad generalizations about male drinking and driving habits, Water and Power fell back on the broad assumption that women live longer than men. Admittedly, this assumption "is not entirely without empirical support." *Weinberger v. Wisenfeld,* 420 U.S. at 647, 95 S. Ct. at 1233. However, because over 80% of men and women share common death ages, the congruence between an individual's life span and sex is weak. Moreover, Water and Power's use of this solely sex-based criterion to charge female employees more for pension benefits equal to those of male employees neither serves "important governmental objectives" nor is "substantially related to the achievement of those objectives." *Id.* at 197, 97 S. Ct. at 457.

The primary purpose of Water and Power's Plan is to provide employees with a monthly income typically used to satisfy short-term daily needs arising during retirement. Although the Plan provides the same benefits to male and female retirees, it charged female employees approximately 15% more for these benefits

than male employees. Because this cost differential could be used by males to purchase additional retirement insurance, they were better protected against the vicissitudes of retired life than females. The magnitude of retirees' needs, however, does not correspond in any meaningful way with one sex or the other. See *Califano v. Goldfarb, supra.*

A second purpose of Water and Power's Plan is to provide an incentive for qualified job applicants to choose employment with, and remain at, Water and Power. Thus, the plan does not have its first effect when a participant becomes eligible to retire, but it begins to operate when he or she first accepts employment with Water and Power. The possibility that qualified male job applicants were encouraged to accept employment with, or dissuaded from leaving, Water and Power because of the differential treatment afforded them by its Pension Plan, at the very least, is speculative and remote.

Water and Power's Plan differs significantly from the disability plan considered by the Court in *General Electric Co. v. Gilbert.* Unlike Water and Power's Plan, the program in *Gilbert* was not discriminatory on its face, but merely excluded from coverage disabilities associated with pregnancy which is "an objectively identifiable physical condition with unique characteristics." 429 U.S. at 134, 97 S. Ct. at 407. Thus, the Court emphasized that:

> " 'The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.' [*Geduldig v. Aiello,*] 417 U.S. at 496-497, n. 20." 429 U.S. at 135, 97 S. Ct. at 407.

Water and Power's Plan also divides potential recipients into two groups—men and women. This classification, however, is solely sex-based. The first group is exclusively male and the second group is exclusively female. This is a far cry from the disability plan in *Gilbert* and it is just the kind of sex-based classification that the Court struck down as unconstitutional in *Califano v. Goldfarb, Craig v. Boren, Weinberger v. Wisenfeld,* and *Frontiero v. Richardson.* See *General Electric Co. v. Gilbert,* 429 U.S. at 134, 97 S. Ct. at 407.

B. Water and Power's Pension Plan Imposed on Women a Substantial Burden That Men Were Not Required to Bear.

A *prima facie* violation of Title VII can be established with respect to a classification which is facially neutral if the classification significantly diminishes the employment opportunities of one sex or another, *i.e.,* if the employment policy has a "gender-based effect." *Gilbert v. General Electric Co.,* 429 U.S. at 137, 97 S.Ct. at 409. In *Nashville Gas Co. v. Satty,* .... U.S. ...., ... U.S.L.W. .... (decided December 6, 1977), the Court held that a gender-based effect could be shown if a facially neutral classification scheme burdens one sex and not the other. Slip Opinion at page 5. Thus, even if Water and Power's classification scheme was based on longevity (which it was not), that fact standing alone does not insulate it from Title VII liability. For, as we shall demonstrate, Water and Pow-

er's use of sex-segregated tables significantly burdened its female employees by requiring them to pay nearly 15% more to the Plan than their male counterparts in order to receive the same monthly retirement benefits.

Before discussing the disparate impact of Water and Power's tables on women, two principles must be observed: First, a *prima facie* violation of Title VII can be established "even absent proof of intent" if the *effect* of the practice is to discriminate on the basis of sex or other impermissible classifications. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853 (1971). Second, under Title VII, as contrasted with the Equal Protection Clauses of the Fifth and Fourteenth Amendments, judicial inquiry in disparate impact cases "involves a more probing judicial review of, and less deference to, seemingly reasonable acts of administrators and executives than is appropriate under the Constitution. . . ." *Washington v. Davis*, 426 U.S. 229, 247, 96 S.Ct. 2040, 2051 (1976).

In *Satty*, the issue was whether an employer could deny accumulated seniority and sick leave benefits to pregnant women on leave. The Court held that the question presented with respect to sick leave benefits was indistinguishable from the question decided in *Gilbert*. It found that the denial of these benefits to women was merely a refusal to extend to them a benefit that men cannot and do not receive. However, with respect to accumulated seniority, the Court held that the employer "imposed on women a substantial burden that men need not suffer." Slip Opinion at page 5.

Likewise, in the instant case, Water and Power, by charging women 15% more than men to receive

the same monthly pension benefits, diminished the ability of working women to provide for themselves and their families. For example, as stated above, Marie Manhart and Frances Nouse were forced to contribute to Water and Power's Plan over $5,000 and $6,000, respectively, more than their male counterparts. This loss of income was especially damaging to women like Carolyn Mayshack who was the sole provider for her two young children (R. 61).

The Court adopted an alternate approach in *Dothard v. Rawlinson, supra*. The issue in *Dothard*, in addition to that discussed above, was whether the Alabama Board of Corrections could set minimum height and weight requirements for prison guards which excluded 41.13% of the female population and less than 1% of the male population from employment consideration. The Court held the standards involved finding that "to establish a *prima facie* case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." .... U.S. at ...., 97 S.Ct. at 2726.

It cannot be disputed that Water and Power's use of sex-segregated tables had a "significantly discriminatory" impact on women. Because women as a class live longer than men, each woman was required by Water and Power to contribute nearly 15% more to its Pension Plan than her male counterpart. It does not require exceptional prescience, however, to know that not *all* women outlive *all* men. In fact, as stated above, "the great majority of men and women—84%—share common death ages." *Henderson v. Oregon, supra* at 1277.

Water and Power's use of sex-segregated tables had a greater discriminatory effect on women than the height and weight regulations held invalid in *Dothard*. Thus, in *Dothard*, the facially neutral classifications used for hiring prison guards impacted on less than one-half of the female population. Water and Power's practice, on the other hand, penalized nearly five out of six women and, in addition, provided a windfall to a like number of men.

There is no available data showing that among *working people* females live longer than men. The difficulty of defining the relevant class and compiling accurate statistics was addressed by Justice Arterburn concurring in *Reilly v. Robinson, supra:*

> "[T]here is no showing or evidence presented by the Appellant [Retirement] Board that women teachers live longer than men teachers. There is no statistical evidence or mortality table presented that shows that in the teaching profession females have a longer life span than males.
>
> "I grant that when the population as a whole is considered statistics indicate women on the average live longer lives than men. *However, I ascribe that result to the common knowledge that traditionally men engage in more hazardous or stressful occupations (such as mining, steel construction) while many women are engaged in household activities. To me such a fact colors the mortality tables comparing men and women.*
>
> "We are dealing in this case solely with the teaching profession. I'm inclined to believe that the stresses, strains and hazards of that profession apply alike to the male and female teacher. Until there is evidence to the contrary I must conclude the mortality rate is the same." (Emphasis added.) 360 F.2d at 191.[18]

Once a *prima facie* case of disparate impact is established, "[t]he touchstone is business necessity." *Griggs v. Duke Power Co.*, 401 U.S. at 431, 91 S.Ct. at 853. In other words, the discriminatory practice must be "necessary to the safe and efficient operation of the business." *Robinson v. Lorillard*, 444 F.2d 791, 798 (5th Cir. 1971), *cert. denied* 404 U.S. 1006 (1971). See *Dothard v. Rawlinson, supra,* .... U.S. at ...., 97 S.Ct. at 2728, n. 14.

The Fourth Circuit in *Robinson* set forth a threefold test for determining when to apply the business necessity exception: (1) the business purpose of the challenged practice must be sufficiently compelling to override any discriminatory impact; (2) the challenged practice must effectively carry out the business purpose it is alleged to serve; and (3) there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced or accomplish it equally well with lesser discriminatory impact. 444 F.2d at 798.

Water and Power's practice fails the *Robinson* test on all three counts. As stated above, not only does Water and Power's use of sex-segregated tables serve no business purpose, but *alternative methods of predicting longevity which are not based solely on sex* are available. These alternatives were discussed above.

---

[18]Justice Arterburn's belief is shared by at least one commentator. In Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B. U. L. Rev. 624, n. 2 (1973), the author suggests that because women traditionally have not been employed in stressful occupations, and because they are now more frequently filling these higher-paying positions, the longevity gap will narrow.

The first is the sex-neutral table which pools the risk of longevity associated with sex in the same manner as other longevity risks are pooled. If Water and Power still believes that sex is the best identifiable predictor of an individual's life span, it would still be entitled to use data based on the male-female mix of Plan members to project funding requirements. However, contribution rates would be the same for both sexes. The sex-neutral table is suggested by various commentators as the best means of complying with Title VII's anti-discrimination mandate. See, *e.g.*, Note, Developments in the Law: Employment Discrimination in Title VII of the Civil Rights Act of 1964, *supra* at page 1173.

The second alternative is for Water and Power to use a multi-factor table. As stated above, this table is based on a variety of factors affecting longevity, such as smoking and drinking habits, normality of weight, prior medical history and family longevity history. This method, which was mentioned by the Court of Appeals, not only has a markedly less discriminatory impact on women, but more accurately predicts longevity than sex-segregated tables. Although the initial switch to the multi-factor table may be inconvenient, Title VII, like the Constitution, should recognize "higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656, 92 S. Ct. 1208, 1215 (1972).

TIAA-CREF, at pages 26-27 of its *Amicus Brief*, claims that if the Court requires equal contribution rates, men will be forced to subsidize women and will, therefore, opt out of the Plan in order to buy benefits at a lower cost. This in turn, it argues, will

result in higher pension costs for those persons that remain in the Plan. TIAA-CREF's scenario, however, is inapposite to the instant case for several reasons. The most obvious reason is that Water and Power's Plan is mandatory, that is, participants are not permitted to opt out of the Plan. Moreover, it is misleading to state that under sex-neutral tables men subsidize women. In fact, as we have seen, nearly five out of six women share common death ages with their male counterparts. Thus, rather than charging all women for the longevity associated with one woman in six, a requirement of equal contributions would spread this risk over the entire group. This, of course, is no different than the present situation where, for example, non-smokers are subsidizing smokers and it typifies the manner in which group insurance plans work.

Nothing in the Court's decision in *Satty* or *Gilbert* compels acceptance of Water and Power's practice in the instant case. In the pregnancy cases, the employer merely refused to extend to women a benefit that men could not and did not receive, *i.e.*, sick leave benefits for pregnancy in *Satty* and disability benefits for pregnancy in *Gilbert*. In the case at bench, there exists an entirely different situation. *Longevity, unlike pregnancy, is a characteristic by no means unique to women.* Thus, while some men live longer than some women (and some men are better drivers than some women), no man can become pregnant.

WATER AND POWER'S USE OF SEX-SEGREGATED TABLES VIOLATES TITLE VII AS INTERPRETED BOTH BY THE EEOC AND THE DEPARTMENT OF LABOR.

A. EEOC Guidelines Forbid Employers From Requiring Female Employees to Pay More for Pension Benefits Than Similarly Situated Male Employees.

Congress created the EEOC to enforce the anti-discrimination mandate of Title VII (42 U.S.C. §2000 e-4). Although EEOC rulings, interpretations and opinions are "not controlling upon the courts by reason of their authority, [they] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944), quoted in *Gilbert v. General Electric Co., supra,* 429 U.S. at 141-142, 97 S. Ct. at 411, and are entitled to deference, *Griggs v. Duke Power Co.*, 401 U.S. at 433-434, 91 S. Ct. at 854-855.

EEOC guidelines provide that "[i]t shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits." (29 CFR §1604.9(b).) *Moreover, the guidelines categorically assert that "[i]t shall be an unlawful employment practice for an employer to have a pension or retirement plan . . . which differentiates in benefits on the basis of sex."* (29 CFR §1604.9(f).) The guidelines further prohibit as "a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater

with respect to one sex than the other." (29 CFR §1604.9(e).)

The EEOC has applied its guideline standards to a case identical to the instant case. In rejecting the argument that equalizing monthly payments would discriminate against men, who as a class would receive less because they tend to die sooner, and in favor of women, who would receive more because they generally die later, the EEOC stated:

> ". . . The Commission has held that sex-based actuarial tables cannot be used by an employer to justify paying higher benefits to males than to females where contributions by members of each sex are the same. Commission Decision Nos. [sic] 7[4]-118. An inescapable corollary to this principle is that *an employer may not require a higher contribution from members of one sex where benefits to members of both sexes are the same.*
>
> ". . . Title VII is not, however, concerned with whether benefits to each sex group *as a class* are equal—Title VII looks to *individual* benefits. *For the individual, the 'benefit' provided by a retirement plan is not some statistically determined 'average total payment' received by members of the same sex, it is 'a pension of X dollars per month.'* It is *this* benefit that Title VII requires be the same for both males and females.
>
> *"The EEOC Guideline relating to retirement plans is based upon the fundamental Title VII precept that generalizations relating to sex, race, religion, and national origin cannot be permitted*

to influence the terms and conditions of an individual's employment, even where the generalizations are statistically valid. It violates Title VII for Respondent to require its female employees to pay more than similarly situated male employees for the same monthly pension." EEOC Decision No. 75-147, CCH EEOC Decisions ¶6447 at 4191 (Employment Practices Guide, 1975). (Emphasis added.)[14]

As with the seniority guideline at issue in *Satty*, the EEOC's 1972 position on pension benefits "is fully consistent with past interpretations of Title VII by the EEOC." *Nashville Gas Co. v. Satty*, Slip Opinion at page 6. Thus, it has never issued conflicting interpretations on pension benefits as it did regarding disability benefits for pregnancy. Rather, the EEOC's position on pension and retirement plans has become more detailed over time reflecting the agency's thought and experience.

The EEOC's first guidelines on sex discrimination, issued in 1965, were narrow in scope and specifically addressed only the most blatant forms of sex discrimination in employment (30 Fed. Reg. 14926-28 (Dec. 2, 1965)). In the following years, through court cases and employee charges of sex discrimination brought before it, the EEOC became increasingly aware of the variety of more subtle discriminatory practices in the area of fringe benefits. As a result, it moved toward enunciating a more detailed position on this issue.

[14]EEOC Decision No. 74-118, cited by the EEOC in Decision No. 75-147, held invalid a plan which required equal male and female contributions but which paid fewer benefits to females than to males.

In 1968, the EEOC first published guidelines directed at sex-based discrimination in retirement plans. The new guidelines specifically provide that a difference in optional or compulsory retirement ages based on sex violates Title VII. The guidelines also put employers on notice that the EEOC would rule on the validity of other sex-based differences in retirement plans, such as differences in survivors' benefits, on a case by case basis (33 Fed. Reg. 3344 (Feb. 24, 1968)).

The EEOC issued its present guidelines on sex discrimination in 1972 based on seven years of experience. The soundness of these guidelines, and the weight to which they are entitled in determining legislative intent, should not be diminished simply becasue they are the product of thoughtful and conscientious deliberation. Indeed, the EEOC's decision to gradually detail its position is to be expected in an area as complex as employment discrimination. The EEOC should be commended, not criticized, for its cautious approach.[15]

In addition to its guidelines, the EEOC has issued numerous decisions invalidating both retirement age

[15]The gradual perfection of EEOC guidelines is paralleled by Congress' own experience in the area of employment discrimination. See Senate Committee Report on the Equal Employment Opportunity Act of 1972:

> "In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. . . . Experience has shown this view to be false. [¶] Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs. . . . [¶] In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful. (Senate Report No. 92-415, 92d Cong., 1st Sess., p. 5.)

and benefit differentials based on sex. The EEOC's earliest position is detailed in *Rosen v. Public Service Electric & Gas Co.*, 409 F.2d 775 (3rd Cir. 1969). In that case, on January 26, 1966, the EEOC found reasonable cause to believe that a pension plan discriminated against male employees in violation of Title VII. The plan provided that "a male employee taking early retirement at age 60, after 30 years service, would receive substantially lower pension benefits than a female employee retiring at the same age, with the same length of service, assuming the same average salary." 409 F.2d at 775. The EEOC also found that the plan discriminated against women by forcing them to retire five years earlier than men. 409 F.2d at 775, at note 8.

A steady stream of other EEOC decisions likewise have found that sex-based differentials in both retirement benefits and age violated Title VII. See, *e.g.*, Case No. YNY 9-034, CCH EEOC Decisions ¶6050 (6-16-69) (age and benefits for survivors); Case No. YNY 9-027, 1 FEP Cases 921 (7-3-69) (age); Decision No. 70-45, CCH EEOC Decisions ¶6041, 2 FEP Cases 166 (7-18-69) (age); Decision No. 70-75, CCH EEOC Decisions ¶6049, 2 FEP Cases 684 (4-20-70) (age); Decision No. 71-562, CCH EEOC Decisions ¶6184, 3 FEP Cases 233 (12-4-70) (age and benefits); Decision No. 71-1102, CCH EEOC Decisions ¶6200, 3 FEP Cases 271 (12-31-70) (age); Decision No. 71-1580, 3 FEP Cases 812 (4-8-71) (age and benefits for survivors); Decision No. 72-0702, CCH EEOC Decisions ¶6320, 4 FEP Cases 316 (12-27-71) (age); Decision No. 72-1919, CCH EEOC Decisions ¶6370, 4 FEP Cases 1163 (6-6-72) (benefits); Decision No. 74-118, CCH EEOC Decisions ¶6431 (4-26-74) (benefits); Decision No. 75-020, 11 FEP Cases 1496 (9-4-74) (benefits); Decision No. 75-147, CCH EEOC Decisions ¶6447, 11 FEP Cases 1486 (1-13-75) (age and benefits).

TIAA-CREF at page 42 of its Amicus Brief quotes from a 1966 EEOC opinion letter which is contrary to the position just described. This letter, however, was written during the formative years of EEOC's development and it should not now be used to undermine *guidelines* which are the product of seven years' experience. Needless to say, the 1966 letter, which is of no precedential value, is outside the mainstream of EEOC's unfolding position. (The letter is also contrary to the EEOC's earlier stated position in *Rosen v. Public Service Electric & Gas Co., supra.* See discussion above.) As the Court observed in *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349, 73 S. Ct. 287, 290 (1953):

> "'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."[16]

---

[16]TIAA-CREF also points out at pages 41-42 of its Amicus Brief that the EEOC in 1965 agreed to apply relevant Labor Department interpretations under the Equal Pay Act to Title VII in order to harmonize the statutes. (29 CFR §1604.7(b)). However, TIAA-CREF omitted from its quotation of §1604.7(b) that the EEOC determined that only 29 CFR Parts 800.119 through 800.163 were, in fact, relevant. Part 800.116(d), on which TIAA-CREF relies, was not among the included sections.

B. Labor Department Interpretive Bulletins, Like EEOC Guidelines, Forbid Employers From Requiring Female Employees to Make Larger Pension Contributions Than Similarly Situated Male Employees.

Section 703(h) of Title VII (42 U.S.C. §2000e-2(h)), popularly known as the Bennett Amendment, permits an employer "to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if differentiation is authorized by the provisions of section 206(d) of Title 29." Section 206(d), among other things, permits discrimination based on "a differential based on any other factor other than sex."[17]

Water and Power and various amici have argued that the use of sex-segregated mortality tables is valid under the Bennett Amendment as based on a "factor other than sex," *i.e.*, longevity. As discussed earlier, however, "[s]ex is exactly what it is based on." Court of Appeals opinion, 553 F.2d at 588. If Water and Power's tables were based on longevity, they would

---

[17]Section 6(d)(1) of the Equal Pay Act, 29 U.S.C. §206(d)(1), provides, in partinent part:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex*. . . ." (Emphasis added.)

have reflected other more relevant factors such as smoking and drinking habits, normality of weight, prior medical history and family longevity history.

In interpreting Section 206(d), the Labor Department has never sanctioned the practice of requiring female employees to make larger pension plan contributions than their male counterparts. To the contrary, *it has always maintained that wage differentials based on employment cost comparisons must be made on an individual and not on a class basis.*

The Labor Department first addressed the use of sex-based wage differentials in a June 18, 1964 opinion letter issued by the Wage and Hour Administrator. As in the instant case, the employer was attempting to justify an eight cent hourly wage differential between its male and female employees based on data showing that pension benefits, hospitalization and medical insurance, turnover costs and rest period benefits cost eight cents more an hour for women than for men. (Three cents an hour was attributed to pension costs.) The Administrator, however, held that the "factor other than sex" exception could not be claimed where the employer had analyzed only some but not "all of the elements of employment costs" and declared the differential invalid. Wage and Hour Manual, 95:607 (BNA 1964).

This ruling was amplified by the Administrator in an Interpretive Bulletin issued February 11, 1966. The Bulletin provides that:

> "A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group

does not qualify as a differential based on any 'factor other than sex,' and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. *To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act.* Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility." 29 CFR §800.151, 31 Fed. Reg. 2657 (Feb. 11, 1966). (Emphasis added.)[18]

The Labor Department successfully implemented its policy in *Wirtz v. Midwest Mfg. Co.*, 18 WH Cases 556 (S.D. Ill., 1968, not otherwise reported), an Equal Pay Act suit brought by the Department to eliminate a ten cent an hour sex-based wage differential. Midwest

[18]Water and Power and various *amici* cite 29 CFR §800.-116(d) in support of their position. This Labor Department Bulletin permits an employer to provide unequal pension benefits for men and women if *employer* contributions to the plan are the same for both sexes. Not only does this Bulletin make no reference to *employee* contributions, but it is not included among the Labor Department regulations to which the EEOC initially agreed to defer, *i.e.*, 29 CFR Parts 800.119 through 800.163. See note 16, *supra*.

claimed that the differential was justified as a factor other than sex because of the additional cost required to provide its female employees with equal unemployment compensation, workers' compensation, and accident and health insurance. The Labor Department disagreed and, in a consent decree, repeated that a wage differential based on "claimed differences between the average cost of employing women employees *as a group* and the average cost of employing men employees *as a group* . . . does not qualify as a differential based on any 'other factor other than sex.'" (Emphasis in original.) 18 WH Cases at 560-561.

The instant case parallels *Midwest* and the case discussed in the Administrator's 1964 opinion letter. In each case, women received an effectively lower wage rate than their male counterparts because of the higher cost of providing them with pension and other benefits. The lower rate in *Midwest* and the opinion letter resulted from a wage differential based on these higher costs; in the instant case it resulted from the larger pension plan contributions women were required to make from their paychecks. Thus, a man and a woman performing the same work and each earning $1,000 a month contributed $49.70 and $57.10, respectively, to Water and Power's Plan.[19] The net result of the woman's larger contribution was that she earned 4.6 cents an hour less than her male counter-

[19]These figures conform to the 14.84% contribution rate differential that Water and Power admits existed until January 1, 1975. See Affidavits of Harry Church (R. 308) and Allan F. Larson (R. 311).

part, just as the woman in the opinion letter would have earned three cents an hour less because of pension costs.[20] For this reason, the Labor Department filed an *amicus curiae* brief in the Court of Appeals challenging Water and Power's discriminatory practice.

The legislatiave history underlying the Equal Pay Act supports the Labor Department's position that Water and Power's use of sex-segregated tables was unlawful and explodes the myth that the practice was exempted under Section 206(d)(1)(iv) as based on a factor other than sex.

The House Committee on Education and Labor, which reported out the Equal Pay Act, observed that the factor other than sex exemption was a catch-all for the kinds of distinctions available under subsections (d)(1)(i) through (iii), *i.e.*, distinctions based on seniority, merit or production. It commented:

> "Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours

[20]The fact that women may be paid the same salary as men does not make their wage rates equal under the Equal Pay Act when the actual take-home pay of women is less. With certain exceptions not applicable here, payments made to satisfy minimum wage requirements must be unconditional, *i.e.*, they must be "free and clear," and the employee must actually have use of the money. *Brennan v. Veterans Cleaning Service, Inc.*, 482 F.2d 1362, 1369 (5th Cir. 1973). The same principle applies to the Equal Pay Act since its function also is to increase wages and improve living standards.

> of work lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded." House Report No. 309 to accompany H. R. 6060, May 20, 1963, Committee on Labor and Education, reprinted in 1963 *U.S. Code Cong. & Admin. News* 687, 689 (88th Cong., 1st Sess.).

There is nothing in this House Report to indicate that Section 206(d)(1) was intended to exempt any actuarially based employee program requiring less take-home pay for women, including pension programs, from the requirements of the Equal Pay Act. Exemption (iv), on which Water and Power relies, was designed only to include classifications like those already exempted.[21]

The Report of the Senate Committee on Labor and Public Welfare provides additional support for the principle that sex-based wage differentials must rest on an analysis of *all* employment costs. It states:

> "During the course of the hearings, testimony was introduced on the question of the cost which employers encounter in the employment of women *while* they do not encounter in the employment

[21]During debate on the Equal Pay Act, as pointed out at page 41 of the Amicus Brief of the American Council of Life Insurance ("ACLI"), the House rejected an amendment which would have allowed wage differentials based on the difference in cost associated with employing members of different sexes. As further explained by ACLI, the amendment was rejected by at least two members on the ground that the differentials already were permitted under exception (iv). However, ACLI failed to point out that to be exempted under this amendment an employer would have had to analyze all sex-related employment factors as the Labor Department has ruled. See, *e.g.*, remarks of Rep. Thompson, 109 *Cong. Rec.* 9207 (89th Cong. 1963). In any event, the House and Senate Committee Reports are more reliable indications of legislative intent than the random statements of a few members of the House.

of men. Some employers stated that the costs of their pension and welfare plans were higher for women because of maternity costs in their health benefits and because of the longer lifespan of women in pension benefits. . . .

"This question of added cost resulting from the employment of women is one that can be only answered by an ad hoc investigation. Evidence was presented to indicate that while there may be alleged added costs, these are more than compensated for by the higher productivity of women against men performing the same work and that the overall result for the employer was a lesser production cost than would result from the hiring of only men. Furthermore, questions can legitimately be raised as to the accuracy of defining such costs as pension and welfare payments as related to sex. . . .

> "*It is the intention of the committee that where it can be shown that on the basis of all of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential, the Secretary can permit an exception similar to those he can permit for a bona fide seniority system or other exception mentioned above.* "(Emphasis added.) 109 Cong. Rec. 8915.[22]

In sum, Water and Power's contention that its use of sex-segregated tables was exempted from Title VII

[22]TIAA-CREF at page 34 of its Amicus Brief quoted only a selected portion of this part of the Senate Report and concluded that wage cost differentials based solely on greater pension costs for women were justified as based on a factor other than sex. As the entire Senate Report indicates, however, this is not the case.

because the tables were "based on any other factor other than sex" is totally without merit. Sex is exactly what Water and Power's tables were based on and there exists no compelling authority that Congress intended to insulate even customary actuarial practices that discriminate against women from the type of discrimination forbidden by Title VII.

THE RANDOLPH-HUMPHREY COLLOQUY DOES NOT SUPPORT WATER AND POWER'S CLAIM THAT THE BENNETT AMENDMENT WAS DESIGNED TO PERMIT DIFFERENTIAL TREATMENT OF MEN AND WOMEN UNDER RETIREMENT PLANS.

Despite the overwhelming legislative intent not to exclude sex-related wage differentials based on selected costs of employment under the Equal Pay Act, Water and Power relies on a colloquy between Senators Randolph and Humphrey as evidence of what Congress intended Section 206(d)(1) to encompass. In this exchange, which occurred during debate on the Civil Rights Act but after the *Bennett Amendment* was adopted, Senator Humphrey stated that the purpose of the Amendment would permit differences of treatment in industrial benefit plans, including earlier retirement options for women.[23]

[23]The entire Randolph-Humphrey exchange is as follows:

> SEN. RANDOLPH: Mr. President, I wish to ask of the Senator from Minnesota [Mr. Humphrey], who is the effective manager of the pending bill, a clarifying question on the provisions of Title VII.
>
> I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee

(This footnote is continued on next page)

Senator Humphrey's opinion on the Equal Pay Act clearly is not the law. That Act, which was intended to provide equal pay for equal work, has no application whatsoever to differential retirement ages based on sex. Title VII, on the other hand, does prohibit this type of discrimination. *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir. 1971), *cert. denied*, 404 U.S. 939 (1971). As the Court of Appeals in the instant case stated:

> "It is questionable whether the Senator's statement, made during the debates on the incorporating statute [i.e., Title VII], would be significant when it erroneously interprets the incorporated statute [i.e., the Equal Pay Act]." 553 F.2d at 590.

The linchpin of the Randolph-Humphrey colloquy, which was that the Bennett Amendment permitted certain sex-based practices then prevailing under social security statutes, was recently rejected by the Court in *Califano v. Goldfarb, supra*. During the same Senate colloquy in which Senator Humphrey volunteered that the Bennett Amendment permitted early retirement options for women, he stated that the Amendment also permitted differential treatment under social security statutes as between widows and widowers. These, of course, were the very social security statutes held unconstitutional in *Califano* where the Court found that "women contributors to the social security system were

docs not. These differences in treatment as I recall, are of long standing. Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law?

SEN. HUMPHREY: Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it."

110 Cong. Rec. 13663-64, June 12, 1964.

disadvantaged as compared to similarly situated men." 430 U.S. at 208, 97 S. Ct. at 1027. Moreover, the social security system did not then, and does not now, use sex-based tables to determine employee contributions to, or benefits from, the Old-Age and Survivors Disability Insurance Trust Funds. 42 U.S.C. §§401(a), *et seq.*

Senator Humphrey's concern in his exchange with Senator Randolph was to preserve favorable treatment for women. Thus, in a letter to a Mr. Nicholls of the Northwestern Bell Telephone Company, Senator Humphrey stated that Title VII was, in part, designed to improve the employment status of women and that "it would be a gross distortion of the provisions of Title VII to apply this language in a manner which impaired existing pension, retirement, or benefit programs" favoring women. *Rosen v. Public Service Electric & Gas Co.*, 328 F. Supp. 454 (D.C.N.J. 1970), *remanded* in 477 F.2d .... (3rd Cir. 1973). It is reasonable to assume, therefore, that in his exchange with Senator Randolph, Senator Humphrey did not sanction discriminatory practices which, like the practice at issue in the instant case, were aimed against women.[24]

[24]This interpretation of Title VII is contrary to other indications of legislative intent. One commentator has stated that "Congress did not share Senator Humphrey's belief about the scope of the Act." M. Gold, "Equality of Opportunity in Retirement Funds," 9 Loyola L. Rev. 596, 602 (1976). Another has called Senator Humphrey's comment on the scope of Title VII "quite puzzling." Note, Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964, *supra*, 84 Harv. L. Rev. at 1173. See also M. Bernstein and L. Williams, "Title VII and the Problems of Sex Classifications in Pension Programs," *supra*, 74 Col. L. Rev. at 1218, finding that Senator Humphrey's exchange with Senator Randolph "took place several hours after the [Bennett] Amendment was adopted, casting some doubt on its value as interpretive history."

Congress put to rest any question concerning the vitality of Senator Humphrey's remark when it amended Title VII in 1972 to extend its protection to state and local government employees. The Conference Report on the Amendments stated that "[i]n any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.[25] Case law in 1972 included two decisions striking down differential retirement ages under Title VII, the Seventh Circuit's opinion in *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir. 1971), *cert. denied*, 404 U.S. 939, and the District Court's opinion in *Rosen v. Public Service Electric & Gas Co., supra.*

Both the *Bartmess* and *Rosen* decisions expressly rejected the Randolph-Humphrey colloquy as a proper interpretation of the Bennett Amendment. Thus, the *Bartmess* Court, quoting the lower court in *Rosen*, found that "[t]he debates in Congress neither support nor refute" Senator Humphrey's statements. 444 F.2d at 1190. It concluded that "absent some strong indication of legislative intent to the contrary, we must read the words of the statute with their commonly accepted meanings." *Id.*

---

[25]*Legislative History of the Equal Employment Opportunity Act of 1972* ("Legislative History"), United States Senate (U.S. Gov't. Printing Office, Washington, D.C., 1972), at page 1844. The Court in *International Brotherhood of Teamsters v. United States*, ... U.S. ....., 97 S.Ct. 1843, 1864, n. 39, found that the 1972 Conference Committee Report was not compelling in that case because the section at issue was part of the 1964 Act. In the instant case, however, public employees were brought under Title VII by the 1972 Amendments and, therefore, the intent of that Congress as expressed in the Conference Committee Report "controls." *Id.*

The Court of Appeals in the instant case recognized the problems inherent in Senator Humphrey's remarks and gave short shrift to the Randolph-Humphrey colloquy:

> "The discussion occurred hours after passage of the Bennett Amendment and cannot be said to be a part of the legislative history of that amendment. The Department claims that although the statement was made after the Bennett Amendment was adopted, it was still made before the Senate voted on the entire Civil Rights Act. Thus, it claims that Senator Randolph and others who may have wanted to preserve such distinctions were misled into not offering a further amendment for that purpose. This argument might have some merit were it not for the fact that the same Congress (the 88th) passed both the Civil Rights Act and the Equal Pay Act, and it seems unlikely that Senator Humphrey's erroneous interpretation of the latter misled many, if any, senators. It certainly misled no members of the House. So far as appears, members of the House never heard of it." 553 F.2d at 589. See also Decision on Petition for Rehearing.

Indeed, every court to consider whether sex-based retirement ages violate Title VII has held that they do. *Chastang v. Flynn & Emrich*, 541 F.2d 1040 (4th Cir. 1976); *Peters v. Missouri Pacific Railroad Co.*, 483 F.2d 490, 492, n. 3 (5th Cir. 1973) (in banc); *Rosen v. Public Service Electric & Gas Co., supra; Bartmess v. Drewrys U.S.A., Inc., supra;* and *Fitzpatrick v. Bitzer*, 390 F. Supp. 278 (D. Conn. 1974), *aff'd on this issue*, 519 F.2d 559 (2d Cir.

1975), *aff'd in part and rev'd in part on other grounds,* 427 U.S. 445, 96 S. Ct. 2666 (1976).

The Court in *General Electric Co. v. Gilbert, supra,* quoted Senator Humphrey's statement to Senator Randolph with apparent approval. 429 U.S. at 144, 97 S.Ct. at 412. Based on this remark, the Court held Labor Department interpretations of Section 6(d) of the Equal Pay Act applicable to Title VII and applied an interpretive regulation issued by the Wage and Hour Administrator to undermine an EEOC construction of Title VII. Respondents do not disagree with the Court's conclusion that Labor Department interpretations of Section 6(d) can be relevant in Title VII actions. (In fact, Respondents have detailed the Labor Department's position above to demonstrate that, unlike in *Gilbert,* its position is consistent with interpretations of Title VII by the EEOC.) Respondents, however, do disagree with the possible inference that sex-based differences of treatment in retirement plans are valid. Because this conclusion was not essential to the Court's decision that General Electric's exclusion of pregnancy disability coverage did not discriminate based on sex, nor even to the Court's rejection of the EEOC guideline, we respectfully suggest for the reasons stated above that Senator Humphrey's remark not be interpreted to achieve this result.

RESPONDENTS ARE ENTITLED UNDEP TITLE VII TO RESTITUTION OF THE CONTRIBUTIONS THEY WERE ILLEGALLY REQUIRED TO MAKE TO WATER AND POWER'S PLAN.

The District Court awarded class members restitution of illegally required contributions from the date the EEOC issued its guidelines prohibiting contribution rate differentials based on sex in retirement plans (April 5, 1972) (29 CFR §§1604.9(b), (e), (f)). This award was affirmed by the Court of Appeals and it should not now be reversed.

The Court in *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362 (1975), after an extensive analysis of Title VII, concluded that one of its primary purposes is to "make persons whole for injuries suffered on account of unlawful employment discrimination." 422 U.S. at 418, 95 S.Ct. at 2372.[26] Based on this finding, it sanctioned an award of back pay to a class of black employees that had been subjected to various forms of employment discrimination.[27]

---

[26]A section-by-section analysis introduced by Senator Williams to accompany the Conference Committee Report on the 1972 Amendments strongly reaffirmed the "make-whole" purpose of Title VII:

> "In dealing with the present section 706(g) [remedies] the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Legislative History, supra,* at 1848.

[27]The Court did not order payment to the plaintiffs because of unresolved factual allegations that the employer was "improperly and substantia'ly prejudiced" by plaintiffs' inconsistent demands for back pay. Rather, the case was remanded to the District Court to review whether the employer was in fact prejudiced. 422 U.S. at 424-425, 95 S.Ct. at 2375.

The instant case is clearly more compelling than *Albemarle* and other cases where back pay is at issue. Because the remedy in cases of that type involve the payment of money which was never actually earned, the award serves not only to make whole individuals who were the targets of employment discrimination, but also to penalize the employer. This is not true, however, in the instant case where Respondents are merely seeking restitution of money they actually earned and had taken away from them in violation of Title VII.

Water and Power's claim that it acted in good faith does not entitle it to keep the additional contributions collected by reason of its discriminatory practice. The Court in *Albemarle* rejected this so-called "good-faith" defense as follows:

> "But, under Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor. If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.'" *Albemarle Paper Co. v Moody, supra,* 422 U.S. at 422, 95 S.Ct. at 2374.

The burden on Water and Power of refunding Respondents' excess contributions is not as significant as it is portrayed. Thus, the Court of Appeals found that:

> "The impact of returning the excess contributions to the plaintiffs in this case is far from oppressive. The amount involved is only 15% of the contributions made by a minority of the Department's employees for the 33-month period from April 5, 1972, to December 31, 1974. This might leave the plan somewhat underfunded, but a number of solutions to that problem are readily available. . . . [W]hatever the adjustments that would have to be made, we do not find that the burden on the pension plan or the Department is sufficient to offset the compelling claim of the plaintiffs to recover the money which they were wrongfully required to contribute." Court of Appeals Opinion, 553 F.2d at 592.

Water and Power likewise is not protected by the doctrine of sovereign immunity contained in the Eleventh Amendment or common law. The simple fact is that "[t]he bar of the Eleventh Amendment to suit in federal courts . . . does not extend to counties and similar municipal corporations." *Mt. Healthy City School Dist. v. Doyle,* .... U.S. ...., 97 S.Ct. 568, 573. Thus, the Eleventh Amendment does not apply to Water and Power which was created under Section 70 of the Los Angeles City Charter.

In any event, the possibility that the sovereign immunity defense might be available in Title VII actions was recently put to rest by the Court in *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666 (1976), a case remarkably similar to the instant case. In *Fitzpatrick,* a class of male plaintiffs sued to invalidate "certain provisions in the State's statutory retirement benefit plan [that] discriminated against them because of their sex." 427 U.S. at 448, 96 S.Ct. at 2668. The provisions in question permitted "women employees

having 25 or more years of state service the right to retire with pension rights five (5) years earlier than similarly situated men, and further provide[d] rate differentials favoring female over male employees who retire with less than 25 years of state service." Court of Appeals decision in *Fitzpatrick v. Bitzer*, 519 F.2d 559, 561 (2d Cir. 1975).

The District Court found that these provisions violated Title VII and granted prospective injuctive relief. The Court, however, refused to award retroactive retirement benefits or reasonable attorneys' fees. It held that "both would constitute recovery of money damages from the State's treasur and were therefore precluded by the Eleventh Amend ent and by this Court's decision in *Edelman v. Jordan*, [415 U.S. 651, 94 S.Ct. 1347 (1974)]." 427 U.S. at 450, 96 S.Ct. at 2665. This decision was affirmed by t e Court of Appeals.[28]

This Court, however, reversed the ruling of the lower courts, finding that under Title VII the " 'threshold fact of congressional authorization,' [*Edelman v. Jordan*] 415 U.S., at 672, 94 S. Ct., at 1360, to sue the State as employer is clearly present." 427 U.S. at 452, 96 S. Ct. at 2670. It stated:

> "It is true that none of these previous cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under §5 of the Fourteenth Amendment. But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana*, 134

[28]The Court of Appeals reversed the decision of the District Court on the issue of attorneys' fees, however, finding that this award would have only an ancillary effect on the State treasury of the type permitted by *Edelman v. Jordan*.

> U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. [Footnote and citations omitted.]" 427 U.S. at 456, 96 S. Ct. at 2671.

In addition, Los Angeles City Charter, Section 220.1 (f) requires that money deposited in Water and Power's Plan "be kept separate and apart from all other money on deposit with the City Treasurer." Water and Power's chief accounting employee (who is also the chief accounting employee for the administrators of the Plan) is the only person authorized to withdraw money from the Plan. Thus, any recovery in the instant action would not be from City coffers but from the Plan itself.

CONCLUSION.

> "[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .' *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400, 31 L.Ed.2d 768." *Frontiero v. Richardson*, 411 U.S 677, 686, 93 S.Ct. 1764, 1770 (1973).

Title VII prohibits an employer from discriminating against "*any individual*" with respect to "conditions of employment" or "employment opportunities" on the basis of sex. (Emphasis added.) Section 703(a)(1), (2).

In enacting Title VII, "Congress intended to prohibit *all practices in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." (Emphasis added and citations omitted.) *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763, 96 S. Ct. 1251, 1263 (1976). Employers are required under Title VII to give "persons of like qualifications . . . employment opportunities irrespective of their sex." *Phillips v. Martin Marietta Corp.*, 400 U.S. at 544, 91 S. Ct. at 497-498.

The reason Congress outlawed sex discrimination in employment is no mystery: women workers consistently have been subjected to a myriad of discriminatory employment practices which in turn has depressed the economic status of women as compared to men. As the House Committee on Education and Labor observed, in explaining the need for the 1972 amendments to Title VII:

> "Recent statistics released from the U.S. Department of Labor indicate that there exists a profound economic discrimination against women workers. Ten years ago, women made 60.80% of the average salaries made by men in the same year; in 1968, women's earnings still only represented 58.2% of the salaries made by men in that year. Similarly, in that same year, 60% of women, but only 20% of men earned less than $5,000. At the other end of the scale, only 3% of women, but 28% of men had earnings of $10,000 or
>
> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone." *Legislative History, supra* at page 64.

The House Report further recognized that Title VII was designed to eliminate employment practices that discriminated against women and to improve their employment status:

> 'Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since

its enactment in 1964. The Equal Employment Opportunity Commission has progressively involved itself in the problems posed by sex discrimination, but its efforts here, as in the area of racial discrimination, have been ineffective due directly to its inability to enforce its findings.

"In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination against women continues to be widespread, and is regarded by many as either normally or physiologically justifiable.

"The Committee believes that women's rights are not judicial divertissements. Discrimination against women is not less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." *Id.* at pages 64-65.

See also S. Rep. No. 92-415, Legislative History, *supra*, at 416-417. Water and Power's reliance on sex-segregated mortality tables served to exacerbate this dismal situation of working women. The use of these tables, moreover, was the product of bureaucratic momentum and administrative convenience and did not serve any legitimate business purpose. That Water and Power has successfully operated its Plan for nearly three years without using sex-segregated tables highlights the fact that such practice was totally unnecessary.

For the reasons set forth in this Brief, Respondents respectfully submit that the Judgment of the Court of Appeals be affirmed.

Dated: December 21, 1977.

Respectfully submitted,

KENNETH M. SCHWARTZ,
LAURENCE D. STEINSAPIR,
ROBERT M. DOHRMANN,
RICHARD D. SOMMERS,
HOWARD M. KNEE,

By ROBERT M. DOHRMANN,
HOWARD M. KNEE,

Attorneys for Respondents.

Of Counsel:
KATHERINE STOLL BURNS,
SCHWARTZ, STEINSAPIR, DOHRMANN,
& KREPACK.

FOR ARGUMENT

Supreme Court, U. S.
FILED
JAN 11 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

PETITIONERS' REPLY BRIEF.

BURT PINES, *City Attorney,*
EDWARD C. FARRELL, *Chief Assistant City Attorney for Water and Power,*
J. DAVID HANSON, *Deputy City Attorney,*
DAVID J. OLIPHANT, *Deputy City Attorney,*
By DAVID J. OLIPHANT, *Deputy City Attorney,*
111 North Hope Street, P.O. Box 111,
Los Angeles, Calif. 90051,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Introductory Statement 1

Summary of Argument 3

I

Setting Salary or Compensation Standards With Respect to Sex Is Not a Violation Under Title VII Unless It Is a Subterfuge to Avoid the Prohibition of the Equal Pay Act 4

1. Setting a Compensation Standard Based on Sex Does Not Violate Title VII 4

2. There Is No Duty to "Justify" Differential Amount Since No Improper Discrimination Has Been Shown 9

3. The Equal Pay Act Only Prohibits Unequal Rate of Wage Payments Where There Is No Other Factor Other Than Sex for Rate of Payment Differential 14

4. Respondents' Statistical Arguments Demonstrate the Validity of Petitioners' Position 16

II

1972 Legislation on Title VII and 1974 Pension Legislation Demonstrates Intent Not to Regulate Governmental Pension Systems or to Require "Unisex" Policies 23

III

Guidelines and Bulletins May Not Be Given Effect Against a Local Governmental Entity Since the Administrative Procedure Act Was

Page

Adopted After Skidmore v. Swift and the Agencies Were Given No Jurisdiction With Respect to Local Government Entities 32

IV

Under the Fourteenth Amendment, Congress May Not Regulate Benefits Provided in Pension Plans of Local Government Entities or Impose Any Standard Regarding Compensation, Except Under a Rational Basis Standard 43

V

Respondents Fail to Show Any Convincing Reason for the Court to Reverse Its Recent Decisions Respecting Differential Amount of Compensation Based on a Factor Correlated With Sex 45

Conclusion 49

APPENDIX

Employment Testing and Judgments; Judicial Tests and Judgments.

TABLE OF AUTHORITIES CITED

Cases Page

Almassy v. L.A. County Civil Service Com., 34 Cal.2d 387, 210 P.2d 503 (1949) 42

Assaro v. Harnett, 414 F.Supp. 473 (S.D.N.Y. 1976), aff'd 553 F.2d 93 30

Bailey v. Los Angeles County (C.D. Cal. 75-3863) 28

Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974) 12

Blake v. City of Los Angeles, 435 F.Supp. 55 (C.D. Cal. 1977) 7, 45

Brawley v. United States, 96 U.S. 168 (1877) 16

Califano v. Goldfarb, 430 U.S. 199 (1977) 47

Dothard v. Rawlinson, ... U.S. ...., 97 S.Ct. 2720 (1977) 7

EEOC v. Colby College, USDC (S.D. Maine, Civ. No. 75-136-SD) 9, 48

Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) 41

Franks v. Bowman Transportation Co., 424 U.S. 747 (1975) 10

Frontiero v. Richardson, 411 U.S. 677 (1973) 47

F.T.C. v. National Casualty Co. (1957) 357 U.S. 560 25

General Electric Co. v. Gilbert, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976) 2, 4, 6, 9, 45, 46, 47, 49

Griggs v. Duke Power, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) 8, 41

Page

Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968) 25

Henderson v. Oregon, 405 F.Supp. 1271 (D. Ore. 1976), appeal docketed (CA 9, No. 76-1706, March 30, 1976) 17, 48, 49

Hewlett Packard v. Barnes, 425 F.Supp. 1294 (N.D. Cal. 1977) 30

Hurn v. Retirement Fund Trust, 424 F.Supp. 80 (C.D.Cal. 1976) 30

International Brotherhood of Teamsters v. United States, ... U.S. ...., 52 L.Ed.2d 396, 97 S.Ct. ...., 45 L.W. 4506 (1977) 8, 41

International Union Electrical Radio & Machine Workers v. Westinghouse Electric, USDC N.D. W.Va., Civ. No. 75-62-F(4) 9

Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974) 5, 47

Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717 (1966) 43, 44

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803) 13

Morton v. Ruiz, 415 U.S. 199 (1973) 40

Nashville Gas Co. v. Satty, ... U.S. ...., 33 Lab. Law Rep., CCH, Dec. 8, 1977 .....4, 6, 9, 10, 24, 46, 49

National League of California Cities v. Usery, 426 U.S. 833, 49 L.Ed.2d 245 .....25, 30, 31, 44

Page

Oregon v. Mitchell, 400 U.S. 112 (1970) ..30, 45

People v. Collins, 68 Cal.2d 319, 66 Cal.Rptr. 497, 438 P.2d 33 (1968) 17

Rosina Smith v. County of Los Angeles (C.D. Cal. 74-253) 28

Schlesinger v. Ballard, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975) 5, 47

Skidmore v. Swift & Co., 343 U.S. 134 (1944) 3, 32, 33, 35, 36

Trans World Airlines v. Hardison, ... U.S. ...., 45 L.W. 4672 (June 16, 1977) 5, 10, 12

United Airlines Inc. v. Evans, 431 U.S. 553 (1977) 41

United States v. Nixon, 418 U.S. 683 (1974) 13, 36

Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 97 S.Ct. ...., 50 L.Ed.2d 450 (1977) 5

Wayne Chemical, Inc. v. Columbus Agency Service Corp., 426 F.Supp. 316 (N.D.Ind. 1977) 30

Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d .... (5th Cir.) 41

Weinberger v. Weisenfeld, 420 U.S. 636 (1975) .. 47

Willingham v. Macon County, 507 F.2d 1084 (5th Cir. 1975) 12

Federal Register

38 Federal Register No. 149 (Aug. 3, 1973) 41

40 Federal Register, p. 24135 (1975) 24

41 Federal Register, pp. 6194-95 31

Page

42 Federal Register, p. 59743 (Nov. 18, 1977) 32
42 Federal Register, p. 64826 (Dec. 28, 1977) 41

Miscellaneous

Abraham Lincoln, First Inaugural Address 38
BNA Daily Lab. Rep. No. 80, April 23, 1976 ....
.....28, 30
109 Congressional Record, pp. 9196, 9209 .....7, 14
110 Congressional Record, p. 13504 7
110 Congressional Record, pp. 13663-4 24
110 Congressional Record, p. 15896 11
111 Congressional Record, p. 13359 11
House Report No. 1980, May 3, 1946 33
Senate Report 93-127 (3 U.S. Code Cong. & Adm. News '74, p. 4884) 28, 29
United States Code Congressional and Administrative News, p. 234 34
3 United States Code Congressional & Administrative News, H.R. 95-533, pp. 4351, 4639 27
3 United States Code Congressional & Administrative News '74, pp. 4908, 4909 29
3 United States Code Congressional & Administrative News '74, p. 5167 29
United States Code, Congressional Service 79th Cong. 2nd Sess., pp. 1195, 1198 (1946) 33

Regulations

Code of Federal Regulations, Title 29, Sec. 800.116 (d) 24

Page

Code of Federal Regulations, Title 29, Sec. 1606.1 41
Code of Federal Regulations, Title 29, Sec. 1607.3 41
Code of Federal Regulations, Title 41, Sec. 60-20.1 (c), p. 287 24

Statutes

California Constitution, Art. I, Sec. 8, Cl. 18 36
California Government Code, Secs. 31620-31622 .. 28
California Government Code, Sec. 31676.1 28
Civil Rights Act of 1964, Sec. 703(a)(1) 5, 6, 47
Civil Rights Act of 1964, Sec. 703(a)(2) ..5, 6, 41, 47
Civil Rights Act of 1964, Sec. 703(h) 6, 7, 8
Employee Retirement Income Security Act, Sec. 2002(b) 26
Government Code, Sec. 7500 21
Internal Revenue Code of 1954, Sec. 401a(4) (26 U.S.C., Sec. 401a(4)) 26
Internal Revenue Code of 1954, Sec. 408 (26 U.S.C. §408) 26
Public Law No. 92-603 24
Public Law No. 404, Sec. 9, Ch. 324 34
86 Statutes at Large 1329, Social Security Amendments of 1972 24
United States Code, Title 15, Sec. 1012(b) 25
United States Code, Title 29, Sec. 206(d) 9

Page

United States Code, Title 29, Sec. 1003(b)(1) 30

United States Constitution, Tenth Amendment 4, 30, 44

United States Constitution, Fourteenth Amendment 3, 4, 31, 43, 44, 45

Textbooks

Blumrosen, Administrative Creativity: The First Year of the Equal Employment Opportunity Commission, 38 Geo. Wash.L.Rev., pp. 694, 733 (1970) 34, 43

Davis, Administrative Law, 3d Ed. p. 68 33

Equal Employment Opportunity Commission, Guidelines on Employment Testing Procedures, Sept. 21, 1966, 2 CCH Empl. Prac. Guide, Par. 16,904 (1967) 34

Morrison and Henkel, The Significance Test Controversy (1970, Aldine Publishing Co.) 42

The Federalist, Nos. 9, 10 (Mod. Lib. Ed.), pp. 54, 57, 58-59 38

The Federalist, No. 81, (Mod. Lib. Ed.) p. 531 34

Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev., p. 1329 (1971) 17

IN THE

Supreme Court of the United States

October Term, 1977
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

PETITIONERS' REPLY BRIEF.

Introductory Statement.

This is a case of statutory construction. The statutes are clear and the legislative history documented.

Respondents, and their supporting amici, ask the Court to make a policy determination contrary to the blend of policy determinations made by the Congress and expressed by the statute. In so doing, they also

seek to have the Court reverse its own recent determinations to enforce the statute as written and adopt a policy they would set.

They seek to extend federal regulation to local government pension systems. They seek to mandate preferential treatment for females in all retirement plans. The latter is contrary to what this Honorable Court said in *General Electric Co. v. Gilbert* 429 U.S. 125, 139 fn. 17, 97 S.Ct. 401, 410 fn. 17, 50 L.Ed.2d 343, 356 fn. 17 (1976) that Title VII does *not* require greater economic benefit be so paid.

The Department's salary schedule establishes the same gross salaries for males and females. If such were paid and they were left to purchase their own annuities the females would have to spend more to buy the same size periodic annuity as the males, because of their longer life expectancy. Instead, the Department, in the present case provided a pension benefit system and withheld a larger contribution from the salary schedule of females than from males. The Department also contributed more towards the female's annuity than to the male's. The respondents wish to mandate a system where either all males will have to subsidize all females or all employers will have to pay more to females to support their annuities than to males. Under this system females will never have to pay the true proportionate cost of their annuities as compared to males. The law does not require this.

Further, the statutes do not extend to the regulation of pension benefits *per se*, or to standards of compensation set by local governmental entities.

Summary of Argument.

1. A differential rate of payment based on sex does not violate Title VII and the Equal Pay Act where another factor such as a pension system is the basis for the rate of payment and such is not a subterfuge. Plaintiffs (respondents) have the burden of proving that the rate of payment is not based on a factor other than sex and petitioners do not need to justify the differential. Respondents here claim, as a matter of federal law, a right to compensation greater than the amount paid to males.

2. Legislative history since enactment of Equal Pay Act demonstrates that Congress intended not to prohibit sex differentiation in compensation or in retirement plans rationally based. Legislative history also demonstrates an intent not to regulate local government pension systems.

3. The adoption of the Administrative Procedure Act after the *Skidmore v. Swift* decision, and the repeated decisions of Congress not to grant the administrative agencies herein any rule-making authority or jurisdiction under either the Equal Pay Act or Title VII precludes giving effect to "guidelines" against petitioners. With respect to local governmental entities, the "public interest" is represented not by EEOC, but by the Attorney General, and the pronouncements of EEOC may not be given any effect against petitioners either on questions of law or on questions of fact, but petitioners are entitled to *de novo* determinations in Article III courts.

4. Congress may not act to enforce Fourteenth Amendment except within the limits of the Fourteenth Amendment, *i.e.* on a rational basis standard. If Con-

gress had acted outside that power to regulate a local government's pension plan, its action would violate the Tenth Amendment.

5. The respondents have failed to show any sound reason why the Court should reverse its decisions in *General Electric Corp. v. Gilbert,* or *Nashville Gas Co. v. Satty.* If there is a rational basis for the Court to take a position favoring females in pension plans as respondents urge, then there is an equally rational basis for upholding systems which, on an actuarial (*i.e.* rational) basis treat the sexes equally. That being the case, your petitioners did not violate Title VII or the Equal Pay Act.

I

SETTING SALARY OR COMPENSATION STANDARDS WITH RESPECT TO SEX IS NOT A VIOLATION UNDER TITLE VII UNLESS IT IS A SUBTERFUGE TO AVOID THE PROHIBITION OF THE EQUAL PAY ACT.

1. Setting a Compensation Standard Based on Sex Does Not Violate Title VII.

Congress did not intend to prohibit the setting of compensation standards based on sex under Title VII. It only intended to prohibit different wage rates payments which violated the Equal Pay Act.

Congress has always been well aware that the very essence of every employment decision (setting salary standards, job classifications, hiring, firing, etc.) necessarily involves "discrimination" in the *proper* sense of that word.

The setting of personnel and salary standards is like the legislative function in government. Laws classify and so discriminate. The application of employment

standards in individual cases is like the judicial function. Judgments discriminate between cases within and those outside the statutory standard. *Cf. Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 97 S.Ct. ...., 50 L.Ed.2d 450 (1977).

The setting of *any* standard necessarily involves a generalization which cannot (in the absence of omniscience) be perfect in formulation or universally fair in application. Accordingly, application of any standard may adversely affect some individual in some respect, *Kahn v. Shevin,* 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed. 2d 189 (1974); *Schlesinger v. Ballard,* 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Trans World Airlines v. Hardison,* .... U.S. .... 45 L.W. 4672 (June 16, 1977).

Every title of the 1964 Civil Rights Act was directed to the setting of standards and to the application of those standards in a particular context. For example Title I was directed to voting standards and their application; Title VII, to setting standards and their application in the employment context.

From the outset, Title VII separately addressed the setting of standards (§703(a)(2)) and the application of those standards in individual cases (§703(a)(1)).

The decisions of this Court impliedly recognize the distinction between the subsections. When the classification or standard is *bona fide,* the plaintiff (or plaintiffs) are not entitled to relief under § 703 (a)(2). On the other hand, when the application of such standard is *bona fide,* then the plaintiff (or plaintiffs[1]) are

---

[1]Plaintiffs may be a "procedural class" for judicial class action purposes; but they are not a "substantive" class established and protected as a "substantive" or "protected class" by a statute of Congress.

not entitled to relief under § 703(a)(1). See *General Electric Co. v. Gilbert,* 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976); *Nashville Gas Co. v. Satty,* .... U.S. ...., 33 Lab. Law Rep., CCH, Dec. 8, 1977.

The statute in light of its legislative history shows that Congress did not intend Title VII to regulate the amount of compensation paid to the sexes.

The House Bill as amended prohibited failing to hire because of sex (§703(a)(1)) and setting standards adversely affecting employment opportunity because of sex (§703(a)(2)). But, the remedies section of the House Bill allowed judicial remedies only in case of "discrimination on account of race, color, religion or national origin."

The legislative history of the House makes clear that the reason for the seeming omission of "sex" in the remedies section, was that "sex" was added to the other sections *only* to ensure that the *practical* impact of the statute among women in the labor market would be color-blind. The House did not intend to expand governmental action regarding "sex" beyond the provisions of the Equal Pay Act. (See Opening Brief App. C5-6.)

The Senate, like the House, intended *not* to expand governmental action regarding sex beyond the prohibitions of the Equal Pay Act.

Thus, the Dirksen-Humphrey substitute bill included three major statements of legislative policy all contained in Section 703(h).

The first was the express statutory exclusions of good faith merit system, good faith seniority system, etc. These were taken from the already enacted Equal Pay Act. Such were clearly intended to have the

same meaning in the later statutes as was intended by the earlier Act. The statute was not intended to regulate the setting of employment or salary standards or the application of such standards. That was to be, as always, the employer's prerogative. The bill was not intended to establish a corporate state.

Moreover, as it was under the Equal Pay Act, classifications based on sex, such as "male packagers/female packagers" were *not* prohibited by Title VII. (109 Cong. Rec. 9196, 9209.) By this addition the bona fide occupational qualification provision previously added in the House thereby became simply a specific application of this broader provision permitting work classifications based on sex, *e.g.,* "male/female packagers," "policemen/policewomen." *Cf. Blake v. City of Los Angeles,* 435 F.Supp. 55 (C.D. Cal. 1977) on appeal to Ninth Circuit; *Dothard v. Rawlinson* .... U.S. ...., 97 S.Ct. 2720 (1977).

The second policy was that "good faith merit system" provisions were also intended to cover the "written test" problem, as the legislative history clearly shows. (110 Cong. Rec. 13504.) The Tower Amendment on testing was subsequently added as the second clause of Section 703(h), simply reiterating the broader exemption of good faith merit system already stated by Section 703(h).

These provisions establish that employment decisions and actions taken pursuant to a good faith system are valid unless there is an *intention* to discriminate.

Thus any system can be expected to impact some individual unfairly in some respect. Thus, where the classification is rational or bona fide, an unlawful practice does not exist merely because someone claims

to have been unfairly impacted by the system. *International Brotherhood of Teamsters v. United States,* .... U.S. ...., 52 L.Ed.2d 396, 97 S.Ct. ...., 45 L.W. 4506 (1977); *Trans World Airlines v. Hardison, supra.*

Conversely where the classification is *not* pursuant to a good faith merit system of classification and testing and unfairly impacts an individual a different rule applies. *Griggs v. Duke Power,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

The third policy statement of Section 703(h) was expressed by the Bennett Amendment.

The Bennett Amendment is the third and last clause of Section 703(h). It is an absolute exclusion from the provisions of Title VII. It expressly allows intentional discrimination between the sexes; to differentiate upon the basis of sex in determining the amount of compensation or wages paid or to be paid, is by nature an intentional act. But an unlawful discrimination between the sexes does not occur unless the Equal Pay Act is violated by the rate of wage payments made.

As this Court has held with respect to the other clauses of §703(h):

> "Section 703(h) 'is a definitional provision; as with other provisions of §703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not.' "
>
> *Trans World Airlines Inc. v. Hardison, supra,* at 45 L.W. 4677.

Thus under Section 703(h) the *amount* of compensation may differ based on sex but no unlawful employment practice is therefore shown *prima facie* under

Title VII, since it expressly states it is not an unlawful employment practice to differentiate upon the basis of sex in determining the *amount* of compensation or wages paid or to be paid unless prohibited by Title 29, §206(d), the Equal Pay Act. (*General Electric Company v. Gilbert, supra; Nashville Gas Company v. Satty, supra; EEOC v. Colby College,* USDC [SD Maine, Civ. No. 75-136-SD][2]; *International Union Electrical Radio & Machine Workers v. Westinghouse Electric,* USDC N.D. W.Va., Civ. No. 75-62-F(4)).

2. There Is No Duty to "Justify" Differential Amount Since No Improper Discrimination Has Been Shown.

The statute does not purport to regulate the *amount* of compensation or salary standards as such. It also does not purport to regulate differentiation upon the basis of sex, as such.

The Government argues that if the *amount* paid or to be paid differs, then this is an "effect" which the defendant must "justify" under Title VII. It argues that the Pension Plan is a "system" of deferred compensation and should be treated as subject to the jurisdiction of Title VII and prima facie unlawful because it has differential "effects."

We again point out that the Executive Branch proposed to Congress in 1972 that Congress adopt and allow expansion into the area of economic control upon grounds of a new definition of "discrimination" in terms of "systems" or effects". (Pet. Op. Br. p. C-24). Congress rejected that proposal. Congress reaf-

---

[2]See Appendix B to amicus brief submitted by Teachers Insurance and Annuity Association.

firmed in its Conference report that only those adverse actions which are statutorily defined by Title VII as an unlawful employment practice are prohibited. (Pet. Op. Br. C-26).

Thus there is no support in the 1964 legislation for the Government's position, which position was flatly rejected in the 1972 Congress (see Opening Brief C-24-26).

Additionally, the remedies section of Title VII lists those employment opportunities that the statute is intended to protect, *i.e.*, where a person is "refused employment or advancement or was suspended or discharged". The denial of seniority, for example, may involve an improper denial of advancement. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1975); *Trans World Airlines v. Hardison, supra; Nashville Gas Co. v. Satty, supra.*

The proponents of the bill repeatedly stated that the bill was an *employment opportunity* provision; not a redistribution of wealth or "welfare state" statute. Even the policy statement of the Act was stricken lest it be construed as implying an affirmative duty to "redistribute" wealth. Clearly, the intent was not to regulate pension programs or benefits with respect to sex. Sharing an insurance fund is not the kind of employment opportunity reached by the statute.

Respondents argue in effect that the statute *requires* differentiation upon some basis *other* than sex in determining the amount of wages or compensation to be paid or paid. The statute does not so state.

It rather states that differentiation on the basis of sex with respect to compensation is not improper. The

Bennett amendment is not merely an exception to Title VII. Rather it "reenacts" the Equal Pay Act as narrowing the prohibitions of Title VII. As such, the legislative history on Title VII is more than "opinions" on an earlier statute; rather it defines the scope of Title VII itself.

Such was succinctly stated when the Senate Bill was returned to the House and presented there in the following terms:

> "[C]ompliance with the Fair Labor Standards Act as amended satisfies the requiremment of the title [VII] barring discrimination because of sex. . . ." 110 Cong. Rec. 15896 (Pet. Op. Br. C-17).

Moreover, Senators Bennett and Dirksen subsequently stated that such was the plain meaning and intent of the provision in Title VII.

> "Simply stated, the amendment means that discrimination in compensation on account of sex does *not* violate title VII unless it *also* violates the Equal Pay Act." 111 Cong. Rec. 13359 (Emphasis added).

The Government argues there is "no reason" to treat "distinction on account of sex any differently under Title VII than one based on race, religion or national origin." (U.S. Brief, p. 16.)

But this involves a policy question on which Congress has clearly spoken, treating the two subject matters quite differently. In fact when the substitute Senate Bill was returned to the House in 1964, congressmen reaffirmed that the subject matters were different and Congress intended they be treated differently.

The problems of race and sex in employment are plainly different as the courts have recognized. Congress did not enact a "sex blind" policy into law. Nor have any of the cases recognized any such policy. (*Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974); *Willingham v. Macon County*, 507 F.2d 1084 (5th Cir. 1975).) All of the arguments advanced by respondents to urge that such be now adopted in this forum are specious at best.

The argument of the agency that there is "no reason" for the Court not to adopt the legislation they urge is improper. Thus the Government argues that the risk of certain kinds of cancer may apparently be reduced in certain nonsmoking religious groups and that the life expectancy may be longer in these groups on that account. (U.S. Brief p. 16.) The argument is irrelevant.

The statute authorizes an employer to differentiate upon the basis of sex in determining the amount of wages or compensation to be paid. But it *prohibits* differentiating between SDA members (a religion) and others with respect to compensation even if it is true that the former can be expected to live longer than a person with a different religious identity.

Even in this area the statute does not require that the employer totally ignore the practices which may be dictated by a religious conviction (*Trans World Airlines v. Hardison, supra*). But with respect to sex it expressly authorizes differentiation on that basis of sex regarding the amount of compensation or wages paid or to be paid.

The agencies imply that the Court needs to be afraid that if the Court gives effect to the statute by holding

that "sex" is treated differently by the statute, then other courts will hold that "race, color, religion," may be used as a basis for differentiation is an argument that is not only patently ridiculous, but is also contrary to the reality.

It is tantamount to saying that if this Court enters judgment according to the law in this case, that other courts will enter judgments contrary to the law in other cases.

The opposite is true.

If this Court did not "read or obey" the law (as Chief Justice Marshall held was the Court's duty), (*Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803)) it could hardly expect the lower courts (or anyone else) to do so.

In fact this Court has impliedly reaffirmed that such is its duty. *United States v. Nixon*, 418 U.S. 683 (1974).

Accordingly, if the Court gives judgment according to the laws as Congress has declared them, it can not only rightly expect the lower courts to do likewise but the Court can rightly exercise its own power to ensure that the lower courts do precisely that.

The opposite course (as urged by the Government) would leave the lower courts subject to no authority or certainty of law; but left to guess and gamble on what possible future "policy" decisions of this Court might subsequently turn out to be in every case that might arise.

3. The Equal Pay Act Only Prohibits Unequal Rate of Wage Payments Where There Is No Other Factor Other Than Sex for Rate of Payment Differential.

The Equal Pay Act is a section of the Fair Labor Standards Act. While the government argues that there is no legislative intent shown *not* to regulate pensions under that Act, the contrary is true. The legislative history in the 88th and earlier Congresses clearly shows that the administration introduced broader bills but Congress decided to limit the proposal by making it an amendment to the Fair Labor Standards Act and so to regulate only "wages" within the meaning of that Act.

Further, just as Title VII refers to a "good faith merit system," so also the legislative history on the Equal Pay Act demonstrates that:

> "A bona fide job classification system will normally furnish the answer to a claim of discrimination [under the Equal Pay Act]." (109 Cong. Rec. 9196, Pet. Op. Br. C-1.)

Thus employees or applicants could be intentionally classified as "male/female packagers" and paid differently if there was a factor of difference other than sex between such classes.

Intentional discrimination *between* the sexes was authorized in the first instance; it was not forbidden, *prima facie*.

What is forbidden is the act of payment of wages to one sex at a periodic *rate*, less than the rate so paid to employees of the opposite sex except where such payment is pursuant to a differential based on any other factor other than sex.

Here the differential rate of payment is made pursuant to a Disability and Pension Plan *System* which withholds contributions from scheduled salary.

The System and its benefits are not subject to the Equal Pay Act. The system is itself another factor other than sex so far as the *payment* of a *wage* rate is concerned.

Here, the wage rates *paid* are different because differential *amounts* are retained for purposes of the pension system.

These amounts will be paid later—on retirement, resignation, etc.

The Equal Pay Act does not require that the *amount* paid be equal at all times.

It rather requires that the *plaintiff* prove that the payment of a lower rate was *not* pursuant to a differential based on some other factor other than unequal wages to the sexes for the same work (Pet. Op. Br. C-20-21).

Respondents object because the rate of wages paid are *differential* between the sexes. But the language "except where such payment [of such differential rate] is made pursuant to a differential based on any other factor other than sex" cannot mean the amount of the differential cannot be directly related to sex. If that were the "interpretation", the phrase would have no meaning since it would never apply.

The sums withheld from the gross salary scheduled result in payments at a different rate, but the "factors" are the Pension Plan (not subject to the Equal Pay Act) plus differential longevity, and the cost of funding for it under such Plan.

Since the amounts retained are not a subterfuge to avoid the statute, no violation of its standards are shown.

This of course assumes, arguendo, that the salary paid is subject to the Equal Pay Act limitations in the first instance.

4. Respondents' Statistical Arguments Demonstrate the Validity of Petitioners' Position.

Respondents advance mathematical arguments to try to show that the pension system is an insufficient basis to justify the differential "wage rate" payments.

Like Zeno's paradoxes, these sophistries only create mathematical illusions completely at variance with objective observable reality.

The underlying *legal* supposition of all such arguments is that petitioners have not (respondents say) made a "sufficient" showing to "justify" the difference in the amounts paid as wages. However, there is no requirement for justification, especially when respondents have *conceded* the factors of difference are actual.

Where the fact is actual, there is no basis for "any plea that in fixing and determining the amount . . . [the Petitioner] was actuated by any want of good faith." *Brawley v. United States*, 96 U.S. 168, 173 (1877).

We do address the mathematical arguments, however, to show that when the sophistry is brought to light it demonstrates the strength of the merits of petitioners' position.

The California Supreme Court has had occasion to point out the ease with which mathematical arguments may cast a spell over and mislead the trier of fact. *People v. Collins*, 68 Cal.2d 319, 66 Cal. Rptr. 497, 438 P.2d 33 (1968); Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev., p. 1329 (1971). That is something that Zeno demonstrated long ago.

The basis for respondents' argument is a graph which was introduced in evidence (apparently without any opportunity for cross-examination) in *Henderson v. Oregon*, 405 F.Supp. 1271 (D. Ore. 1976), appeal docketed (CA 9, No. 76-1706, March 30, 1976). It was attached to the opposition briefs below. Even the majority below did not accept the arguments. The amici purport to show that assuming[3] 100,000 men and 100,000 women at age 65, a "matching" of deaths indicates that about "80%" have "common death ages".[4]

---

[3]As in *People v. Collins, supra*, this involves an unwarranted statistical assumption and leads to incorrect conclusions. There are in fact more women alive after age 65 than men after that age. The assumptions arbitrarily exclude this fact. Further, "matching" or "pairing" deaths of women and men between ages 65-70, for example is somewhat misleading. Given an assumption of 5 years difference in life expectancy (as indicated by the graph in the *Henderson* case, *supra*), the *proper* comparison would be between women age 65-70 and men age 60-65, *i.e.*, 5 years earlier. Finally, the difference in life expectancy is not a constant "5-year" difference but varies at each age. In other words "life expectancy" is an actual factor related to age *and* to sex, but not to either age or sex alone.

[4]Various amici present the same idea with differing percentage figures. But the idea seems to have been first proposed by Professor Barbara Bergmann and presented by Women's Equity Action League (Amicus Curiae for respondents) to the Department of Labor by Dr. Norma K. Raffel at hearings on contract compliance held on September 9, 1974. At that time the "overlap" of 1000 men and 1000 women was said to be 68.1%.

The figure of "80%" and the phrase "common death age" are ambiguous. They appear to mean that relative length of life may be shown thus:

	Shorter Lives	Common Life Period	Longer Lives
Men	20%	80%	
Women		80%	20%

The conclusions to be drawn are:

1. 20% of the shorter-living men must pay for the pensions of 20% of the longer-living women on a "unisex" approach; and
2. on a "unisex finding" basis, 20% of the men receive less than zero benefit from a "unisex funding" system, only 80% of the men receive benefits commensurate with their funding; on the other hand 80% of the women receive benefits commensurate with their funding, 20% of the women receive benefits *greater* than their funding; and
3. every woman is guaranteed that she shall outlive *some* man by five years (*i.e.*, while every woman will not live to the average age of women, every woman will outlive the "corresponding" man by five years and the average death age of men is 5 years less than the average death age of women; and
4. of the total benefits paid to 100,000 men and 100,000 women 20% of the cost of funding benefits ostensibly for men is thereafter applied to pay benefits collected by women; and
5. benefits can be paid to 100,000 men and 100,000 women *only* if a substantial number of additional men are part of the plan and die before receiving any benefits at age 65, since

by hypothesis, the average life expectancy difference of all women is 5 years longer than the average life expectancy for men and the only men shown on the table are those who live to age 65.

The brief of American Council of Life Insurance (pp. 47-49) details the fallacies.

The equities of funding are that if a male and a female buy an annuity they each gamble that it will be sufficient to support them for their entire life expectancy. Ideally, the contributions they each make to purchase an annuity should be sufficient for that purpose. Neither should be left to live without sufficient funding to cover the expected retirement years, nor be asked to fund a life expectancy that he or she will not reach.

Where an annuity is based upon sex-differentiated actuarial tables the male and female have "equal opportunity" of living to the life expectancy funded for each. Where a so-called "sex-neutral" or "unisex" table is constructed, the male funds a life expectancy longer than his true life expectancy. His "opportunity" for collecting what he has purchased is lessened. On the other hand, the female's "opportunity" for collecting more than she has purchased (including a portion of the male's funding) is increased. Such is the basic inequity of respondents' proposal.[5]

---

[5]A simple example of the effect of unisex can be posited. If a hospital had 100 nurses of which but one was male, a retirement system set up by the employer for the nurses on a unisex basis would require that the lone male contribute at a rate which was 99% of the female rate. The lone male would be penalized to benefit 99 females. Respondents' argument suggests precisely this.

This example also illustrates that the sex of an individual must be taken into account in funding and in benefits. Under a "uni-

(This footnote is continued on next page)

Respondents suggest that your petitioners could use a "multi-factor" table to measure contributions and benefits. As we stated in our opening brief, the inclusion of other factors would not make sex a valid basis if it was not to begin with. Nor does the omission of other factors make a differentiation on this single most significant basis improper.

Moreover, the addition of these other factors would probably lead to less accurate funding. Smoking, drinking and obesity are within the control of the individual. Obviously, an annuitant who wanted the lowest rate would start smoking, drinking and be overweight when he buys his annuity and then quit such practices. In an insurance context, such factors make sense. Individuals want to live longer and want to get a lower insurance rate. Public policy encourages good health. In an annuity context, they are nonsense. First, because the annuitant does not want to both die early and get a lengthy annuity. Second, because the risk of non-smoking, non-drinking and non-obesity is on the insurer.

Respondents suggest that since petitioners "equalized" the women's contributions down to the male rate in 1975, the Plan has been operating, and there are no problems.

They suggest that such is a reason to hold that there was a violation before the change and therefore

---

sex" approach, if one of the 99 females *resigns* and a second male employee takes her place, the contribution rate received from all employees *decreases* since the potential liability of the plan decreases. On the other hand, if the lone male *retires,* and a female employee takes his place, the contribution rate goes up, not only because another female may be funded for, but also because the liability of the plan is *less* than it would have been had one of the 99 females retired rather than the lone male with a shorter life expectancy.

this Court should order permanent "unisex" Plan operation and refund of back contributions. The argument is a transparent attempt to have the Court again set policy, by implying that there will be "no harm" in so doing because, they say, the Plan has not suffered. They wrongly state that equalization was accomplished by use of a so-called "sex neutral" table. (Resp. Br. 21.) That is a deliberate attempt to mislead the Court. The Plan is still operated with the use of sex-differentiated actuarial tables. In compliance with the state law (Gov. C. §7500), your petitioners lowered the contribution level of females to the male level. The Department has since contributed the difference.

Of course, other facets of the Plan, such as male contributions, employer contributions, joint and survivor annuity options, vested rights pensions and so forth are still measured and administered based upon sex-differentiated mortality tables.

The briefs of the supporting amici and the study conducted by the Equal Employment Opportunity Coordinating Council as previously noted indicate the widespread potential damage of the lower court decision. We have also cited to the court some of the suits seeking equality and return of contributions on a local and national level.

Even the amici who state that their plans are equal in contributions and benefits, probably use separate mortality tables when it comes to measuring joint and survivor annuities.

Finally, while the statute does not require a showing "in equity" as a reason for differentiating upon the basis of sex with respect to the *amount* of wages or compensation paid, or to be paid, we would mention the following:

1. If the employer had established no system and withheld no contributions for pensions, females would have to pay considerably more for the same periodic benefits as males and would also be deprived of the higher 110% matching benefit on the higher amount they contribute not to mention funding of formula benefits.

2. It is a social fact that women (particularly married women with children) often enter the labor market later (after the children are grown) and retire earlier in order to retire together with husbands who are usually older. The plan provides a return of contributions or a "vested rights" benefit based only on contributions of employer and employee if employee so chooses.

We do not offer this as a matter of proof in legal justification for the system established or for a "violation". We mention it to point out that there are many social factors which can best be met by local government determinations.

3. The order of the courts below deprived *some* women of a substantial benefit.

Since the "vested rights" pensions for employees who retire after making more than one year's contributions but less than five (or who leave the Department and defer their retirement until a late date) is based on the employee and employer 110% matching contributions, the courts' order reducing female contributions necessarily *also* reduces the matching amount and therefore the amount of pension such women might otherwise receive and some of the plaintiff women who have already retired will be adversely affected by the court order.[6]

II

1972 LEGISLATION ON TITLE VII AND 1974 PENSION LEGISLATION DEMONSTRATES INTENT NOT TO REGULATE GOVERNMENTAL PENSION SYSTEMS OR TO REQUIRE "UNISEX" POLICIES.

The legislative history of the years since 1963 indicate two things: first, Congress did not intend to prohibit the use of sex-differentiated actuarial tables in establishing plan benefits; second, Congress did not intend to regulate local government pension systems.

It has always been accepted procedure in retirement and annuity plans to measure contributions or benefits

---

[6]The government's brief urges that the Department sometimes pays more for men than for women. It bases this contention on an answer to an interrogatory concerning six females compared with six hypothetical males described by certain peculiar assumptions stated in the Interrogatory. The *fact* is that prior to 1972, women could retire at age 60, at full pension; men were required to work until age 65 to receive full pension. In the three of the six hypothetical comparisons to which the government refers it was assumed (as dictated by the Interrogatory) that the hypothetical men had retired *before* age 65, but at full pension. This also dictated an assumption of a longer life expectancy for such hypothetical males than if they had retired at 65. It also dictated an assumption of *full* pension payable beginning *before* age 65 rather than one reduced because of early retirement.

Thus the Interrogatory dictated that the hypothetical contributions made by the hypothetical male employee during his employment would have been lower (and the Department's ultimate contributions therefore higher) by reason of the fact that he would be contributing as if he were going to retire at age 65, and then actually retire before that time on full pension. Since the Interrogatory itself asked for figures on an "apples and oranges" comparison a valid conclusion cannot be drawn from the figures given in response to the questions as asked.

by the use of sex-differentiated actuarial tables. Private annuities were similarly funded.[7]

Nothing in the legislation indicates disapproval of such practices. To the contrary, the legislative history shows such systems are not regulated and consideration of costs in relation to longevity benefits authorize paying unequal wages. (See Pet. Op. Br., C-1-18.)[8]

It was not until 1974 that there was a change in the practice of the Social Security System cited by Senator Humphrey in his colloquy with Senator Randolph (110 Cong.Rec. 13663-4) of allowing earlier retirement options for women than for men. P.L. 92-603; 86 Stat. 1329, Social Security Amendments of 1972. We do not debate the wisdom of such options[9] herein but merely cite them to indicate that if Congress intended eradicating the use of sex-differentiated actuarial tables as an unlawful employment practice, it would certainly have changed rather than continue to approve the practice of earlier retirement options.

Until 1972, the provisions of Title VII (and the Equal Pay Act) did not apply to local government,

---

[7]See amicus curiae brief of American Council of Life Insurance for list of state laws differentiating on the basis of sex in connection with retirement, annuities and insurance. Even Jury instructions commonly award different actuarial values for life expectancies.

[8]Other federal agencies than the EEOC continue to accept the use of sex-differentiated tables as a basis for measuring retirement benefits. 41 CFR §60-20.1(c) p. 287, Office of Federal Contract Compliance; 29 CFR §800.116(d) Department of Labor; 40 Fed. Reg. 24135 (1975) Department of Health, Education and Welfare.

[9]We do note that the cases dealing with *mandatory* earlier retirement for females are inapposite because such practice denied an employment opportunity to one sex to continue in employment, and did not involve differentiation regarding compensation. *Cf. Nashville Gas Co. v. Satty, supra.*

and this Court has held that the Fair Labor Standards Act does not apply. (*National League of California Cities v. Usery*, 426 U.S. 833, 845, 49 L.Ed.2d 245, 253.) It is also questionable that Title VII applies to private insurance plans.[10]

The 1972 decision not to define discrimination in terms of "systems" reflects determination of Congress not to be involved in local retirement plans. Such is surely based on Congress' decision that it is unnecessary to invade areas of local control best handled by the people directly concerned. Thus, in the Department's Plan, the Respondents themselves participated in the administration. One of the named plaintiffs was a member of the Board of Administration. (App. 90.)

In the 1972 legislation, if Congress had intended to change its prior approach and regulate pension systems or prohibit differential contributions and benefits, it surely would have done so. After all, in 1968, the second circuit expressly held that females could receive greater benefits than males under the Social Security Act, and that such provisions would not violate the Civil Rights Act of 1964. (*Gruenwald v. Gardner*, 390 F.2d 591, 593 (2d Cir. 1968).)

Further, in 1974, Congress for the first time enacted legislation where it clearly intended to become involved in pensions. That legislation and its history demonstrate both that Congress was not concerned about the use of sex-differentiated actuarial tables and that Congress did not want to regulate Governmental plans.

---

[10]Except as ERISA may apply, it is questionable that all *private* insurance plans are subject to Title VII, since in those states with regulation of the business of insurance, insofar as the Government is concerned, insurers are subject *only* to such state regulation. *McCarran-Ferguson Act* (15 U.S.C. §1012(b)); *F.T.C. v. National Casualty Co.* (1957) 357 U.S. 560, 562.

The comprehensive nature of the Employee Retirement Income Security Act ("ERISA"), the careful attention to detail in the regulation of vesting, funding, actuarial responsibilities and insurance of benefits make it apparent that if Congress ever intended to mandate identical contributions and benefits in retirement plans (assuming mathematical equality were possible) it would surely have done so in this particular act.

The fact that the Act specifically deals with discrimination problems under the tax qualification provisions, prohibiting discrimination in favor of higher paid employees and management indicate Congress' intention not to regulate the practice of funding separately for males and females based on long established actuarial principles. (§401a(4) IRC (1954), 26 U.S.C. §401a (4).)

Similarly roll-over provisions of ERISA permit an employee to leave one employer, and transfer both his and the employer's retirement contributions to an individual retirement account or to a different retirement plan. (Act, Section 2002(b), IRC (1954) Section 408, 26 U.S.C. §408.) There is no provision that such roll-over prohibits the transfer of higher contribution packages for females than for males. Under Respondents' theory, Title VII would prevent females from transferring higher benefits than males. Alternatively, a unisex approach would, of course, lead to females and males receiving different annuities upon reinvestment privately of their returned contributions. We are unaware of any provision of ERISA which requires identical contributions and benefits.

In the legislative history, the House was concerned about increase in pension costs of the legislation.

In addition, in connection with ERISA, House Report No. 93-533 states:

> "While modest cost increases are to be anticipated when the Act becomes effective, the *adverse impact* of *these increases* has been minimized." (Emphasis added.) 3 U.S. Code Cong. & Adm. News, H.R. 95-533, p. 4639.

In the House Report at page 4651 the Education and Labor Committee commented on the vesting standards of ERISA:

> "The exception for plans which provide 100% full vesting upon plan entry is based on the fact that such plans, like the TIAA-CREF plan for college teachers, provide earlier vesting in larger amounts than provided under the bill, and requiring such plans to install earlier membership requirements would impose *burdens well beyond* the *minimum standards* approach intended by the Committee, and might compel such plans to sacrifice immediate full vesting on plan entry." (Emphasis added.)

Such attention to the individual provisions of the excellent TIAA-CREF system demonstrates an intention not to disturb that system and systems like it.

No goal was sought to provide *greater* benefits under ERISA for one sex than another. On the other hand, the serious effect of mandating identical periodic contributions and benefits as urged by respondents herein is well documented in the amicus briefs of Teachers Insurance and Annuity Association of America and College Retirement Equities Fund (TIAA-CREF), the City of New York and New York State Teachers Retirement System. (TIAA-CREF Br. p. 24, City of

New York Brief p. 5, N.Y. State Teachers Brief p. 2.)[11]

The Act, while clearly concerning itself about the vesting of benefits (a matter which involves loss of pension benefits during the first years of service in the private sector) involves a studied determination not to attempt to set benefit levels for any employees. Had the Act or the legislative history mandated disregard of sex-differentiated actuarial tables and pension benefits and contributions measured thereby, Respondents and their amici would have pointed this out. All they have pointed to is that the statute while mandating actuarial soundness does *not* mandate disregarding greater female longevity and the concommitant variation in pension benefits between the sexes.

In considering the cost of vesting provisions under Senate Report 93-127 (3 U.S. Cong. & Adm. News '74, p. 4884), the Senate Committee on Labor and Public

---

[11]In addition to the above, other systems face liability of varying degrees. For example, the County of Los Angeles presently has two similar suits to the within lawsuit. (*Rosina Smith v. County of Los Angeles* (C.D. Cal. 74-253); *Bailey v. Los Angeles County* (75-3863 C.D. Cal.).) Contrary to the generalized statement of the Society of Actuaries, a Washington based firm (Soc. Act. Br. p. 18), until January 1, 1977, the *entire* system of retirement Plans covered by the County Employees Retirement Law of 1937 (California Government Code §§31620-31622, 31676.1) which involves the employees of twenty California Counties (the *County of Los Angeles* alone has some 70,000), had *both* unequal *contributions* and unequal *benefits* in their systems. And, while those under the 1937 Act equalized contributions and benefits as of January 1, 1977, they still face lawsuits seeking returns of contributions and changes in benefits, and there are other California public entities similarly situated. See also expected increases in costs projected by Equal Employment Opportunity Coordinating Committee ("EEOCC") of $60 billion for "equalizing" under their proposed legislation BNA Daily Lab. Rep. No. 80, April 23, 1976 at A-12; *Id.* No. 122, 6-23-76 at A-16-17, E-1 to 3.

Welfare had before it an actuarial study prepared by Donald S. Grubbs, Jr., FSA. That study states, at page 4885:

> "Private pension plans contain endless variety. They contain variety in their plan provisions, including existing vesting provisions, in the extent of their funding, in the distribution of employees they cover by age, *sex*, and years of service in their rates of termination of employment of plan participants, in rates of investment return on their funds, and in many other factors." (Emphasis added.) (*Cf.* Society of Actuaries Brief.)

If the Congress had intended that "sex" be ignored as to the differences in benefit costs and measuring the expense of differing benefits because of life expectancy differences, this study would have become totally useless. (See 3 U.S. Cong. & Adm. News '74, pp. 4908, 4909 re: Committee's actuarial reporting.)

Under "STATEMENTS BY LEGISLATIVE LEADERS" the Honorable All Ullman, ranking majority member of the House Ways and Means Committee, stated:

> "It is axiomatic to anyone who has worked for any time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employees who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed. For this reason, we have been extremely careful to keep the additional costs very moderate." (3 U.S. Cong. & Adm. News '74, p. 5167.)

Of course, if the legislative intent had been to mandate identical treatment although it costs more there would have been no need for the EEOCC or the legislation it proposed. Even the legislation proposed does *not* eliminate sex-differentiation in the measurement of joint survivor annuities. (See BNA Daily Lab. Rep. No. 80, April 23, 1976, A-12; *Id.* No. 122, 6-22-76 at A-16 to 17, E-1 to 3.)

The Courts have held that ERISA was intended to preempt *local law* in the pension area. (*Hewlett Packard v. Barnes,* 425 F.Supp. 1294, 1297 (N.D. Cal. 1977); *Wayne Chemical, Inc. v. Columbus Agency Service Corp.,* 426 F.Supp. 316, 320 (N.D.Ind. 1977); *Hurn v. Retirement Fund Trust,* 424 F.Supp. 80, 82 (C.D.Cal. 1976); *Assaro v. Harnett,* 414 F.Supp. 473, 474 (S.D.N.Y. 1976) aff'd 553 F.2d 93.) Surely, such preemption by this law makes it clear that Congress did not intend to override local laws concerning sex differentiation in contributions and benefits.

Congress exempted the local governments from the provisions of ERISA. (29 U.S.C. §1003(b)(1).) While it has bills under consideration to regulate such plans, it has chosen not to adopt any. This caution comports with the Court's decision that regulation of local government wages under the Fair Labor Standards Act is violative of the Tenth Amendment to the Constitution. (*National League of Cities v. Usery,* 426 U.S. 833, 845, 49 L.Ed.2d 245, 253; on local control see also *Oregon v. Mitchell,* 400 U.S. 112, 128 (1970).)

To administer ERISA, Congress chose two agencies which had theretofore recognized the use of sex-differentiated actuarial tables to provide for separate contributions and benefits in retirement system (the Department of Labor and the Internal Revenue Service). While arguably the Pension Benefit Guarantee Corporation ("PBGC") might wish to insure up to the PBGC "maximum benefits" for males and females in an identical fashion (41 Fed. Reg. 6194-95) nevertheless, when it comes to insuring sufficiently funded plans, the PBGC requires the use of sex-differentiated actuarial tables. This is clear government recognition that pension plans cannot be soundly administered on a "single-sex" basis. The EEOC would use this single statement by the PBGC on insuring benefits to bootstrap the EEOC into power to regulate local pensions systems and the benefits payable thereunder where Congress *did not empower* it to act at all. Further, since Congress has seen fit not to regulate pension systems of local government, surely to attempt to do so under Title VII violates the local sovereignty. (*National League of Cities v. Usery, supra,* pp. 848-849.)

There is no warrant under the 14th Amendment for such regulation.

III

GUIDELINES AND BULLETINS MAY NOT BE GIVEN EFFECT AGAINST A LOCAL GOVERNMENTAL ENTITY SINCE THE ADMINISTRATIVE PROCEDURE ACT WAS ADOPTED AFTER SKIDMORE v. SWIFT AND THE AGENCIES WERE GIVEN NO JURISDICTION WITH RESPECT TO LOCAL GOVERNMENT ENTITIES.

One of the amici supporting Respondents has candidly admitted that the administrative bulletins and guidelines are "an internally inconsistent morass." (U.A.W. Br. p. 53.)

The President of the United States has recently expressed a similar view of the entire administrative field. He proposes to order that all administrative pronouncements be "as simple and clear as possible . . . and should not impose unnecessary burdens on the economy . . . or on state and local governments." 42 Fed. Reg. 59743, November 18, 1977.

The President's goal and policy is noble, necessary and proper.

If the Court can give weight to pronouncements of the executive branch not binding under the Administrative Procedure Act, then *this* goal and policy can and should be given full force and effect by judicial action in the instant case. This can best be done by holding that none of the administrative bulletins or guidelines heretofore issued are entitled to any weight *against* Petitioners in a *de novo* proceeding.

There are *other* major reasons requiring that that be the holding. Such will greatly assist in *judicial* administration of law as we shall show.

We point out first that in 1944, this Court was similarly faced with an administrative morass. It therefore laid down guidelines for the lower courts as to what factors such courts should consider in deciding what effect (if any) to give to administrative pronouncements in a given situation. *Skidmore v. Swift & Co.*, 343 U.S. 134 (1944).

Thereafter, Congress acted on the subject. It enacted the Administrative Procedure Act. That Act was adopted after more than ten years of many comprehensive studies.

President Roosevelt had warned that there was an issue of Constitutional proportions, that growing powers of administrative agencies

> "who perform administrative work in addition to judicial work, threatens to develop a 'fourth branch' of the Government for which there is no sanction in the Constitution." House Report No. 1980, May 3, 1946; U.S. Code, Cong. Service 79th Cong. 2nd Sess., p. 1195. (1946).

The legislative history of the Administrative Procedure Act shows that agencies that had power to regulate, opposed any regulation of themselves. Aversion by the agencies to limitation on their exercise of real or pretended power continues to the present day. (Davis, *Administrative Law*, 3d Ed., p. 68.)

Congress passed the Administrative Procedure Act despite such administrative opposition. It specified that Act was intended to have "across-the-board" application: "The law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure." House Report, *supra*, at 1198.

Accordingly the Act provided that *no sanction shall be imposed* or *substantive rule issued* except (1) within

the jurisdiction delegated to the agency and (2) as authorized by law (Sec. 9, Ch. 324, Pub. Law 404, U.S. Code Cong. & Adm. News, p. 234.)

Thereafter, when Congress passed the Equal Pay Act in 1963 and Title VII in 1964, it did *not* authorize any agency to issue any rules *or* delegate any jurisdiction to any agency. Jurisdiction means, of course, authority or power to speak the law to the facts.[12] The agencies were given *no* such power. In 1972 Congress again determined *not* to delegate any such power to the agencies.

The legislative history of Title VII and the Equal Pay Act conclusively shows that Congress specifically intended that the agencies not have any such authority or jurisdiction. Both agencies have implicitly recognized they have no such power. The earliest guidelines of the EEOC (1966) were issued in the form of what the EEOC "advocates," "encourages" and "recommends" that employers do. EEOC "Guidelines on Employment Testing Procedures, Sept. 21, 1966, 2 CCH Empl. Prac. Guide ¶16,904 (1967). The mentor of such guidelines has frankly acknowledged that the EEOC issued " 'guidelines' since it had no substantive rule-making power." Blumrosen, *Administrative Creativity: The First Year of the Equal Employment Opportunity Commission,* 38 Geo. Wash. L. Rev. 694 (1970). Deferring to such guidelines is thus abdication of responsibility and contrary to law.

Of course, many of such guidelines and bulletins were issued before Title VII even applied to local governmental entities.

---

[12]"This word is composed of jus and dictio, *juris dictio,* or a speaking and pronouncing of the law", The Federalist, No. 81, p. 531, (Mod. Lib. Ed.)

In 1972, in extending Title VII to local governmental entities, Congress did *not* grant quasi-legislative authority to the agency *or* extend EEOC jurisdiction over such local governmental entities. On the contrary, *both* houses of Congress determined that in regard to such local governments, the public interest would be represented in such cases *not* by the EEOC but by the Attorney General. In a similar way, Congress *divided* the power which was originally proposed to be given to the EEOC among several agencies. The reason, simply, is that while separation of power may lead to diversity, it also tends to protect liberty by lessening the corrupting effect which power has.

Thus, while *Skidmore, supra,* speaks of pronouncements of "the office representing the public interest in its enforcement" before the Courts (343 U.S. at 138) the office representing the public interest before the courts where a local governmental entity is involved is *not* the EEOC but the Attorney General. Congress specifically intended that distinction.

Accordingly, even under the *Skidmore* rationale none of the pronouncements of such agencies could have any effect against a local public entity.

Moreover, the passage of the Administrative Procedure Act *after* the *Skidmore* decision clearly limits the authority of *Skidmore* so that no effect may be given guidelines and bulletins against a *public* entity in a *de novo* or other judicial proceeding under Title VII.

The administrative morass at the time of *Skidmore* required guidance for the *lower courts* as to what factors they should consider in determining what legal effect (if any) they should give to a vast variety of administrative pronouncements.

But when Congress *thereafter,* pursuant to its express constitutional authority to make *"all* laws necessary and proper" for carrying into execution *"all* powers vested in the Government or in any department or officer thereof," (Const. Art. I, § 8 Cl. 18, Pet. Op. Br. p. A-1) exercised that power to enact the Administrative Procedure Act as an "across the board" statute, a radically different state of affairs is presented than the situation presented in *Skidmore v. Swift.*

Thus this Court has recently held that rules duly issued pursuant to a statutory grant of authority are binding on all three branches of government. *United States v. Nixon, supra,* p. 696. Given the fact that Congress has the power to make all laws necessary and proper for carrying into effect *all* powers of every department of Government, that holding was *surely* correct.

But if a regulation issued pursuant to procedures of the Administrative Procedure Act is binding on all three branches of government, the Administrative Procedure Act itself is so binding *a fortiori.*

In other words, if Congress has exercised its constitutional power to declare what shall be done by agencies who desire to issue pronouncements which they have jurisdiction to issue in interpreting a statute, the courts may not directly, or in effect, lay down *other* standards for the agencies, or confer power to issue *other* kinds of pronouncements interpreting the law and give legal effect to the pronouncements so issued.

The Administrative Procedure Act provides that no sanction shall be applied except for rules issued in accordance with the procedures laid down in that Act. The other two statutes before the Court (Title VII

and the Equal Pay Act) specifically withheld from the agencies any authority to issue any such rules.

The legislative history also shows that bulletins or guidelines issued by an agency should not have any weight as evidence *against* defendant.

If the Court would give either any injunctive or evidentiary sanction to any "guideline" or "bulletin" issued by any such agency, to rule against Petitioners as did the courts below, this would in effect be holding that the Administrative Procedure Act is not binding on the agencies or the courts, that the jurisdictional limitation of Title VII (which requires *de novo* determinations by the District Court) is not binding on the courts below, that the Congressional will to withhold quasi-legislation and quasi-judicial power from such agencies need not be given effect, but may be disregarded.

Such a holding would be nothing less than an amendment of the Constitution itself—Congress would no longer have the power to make *all* laws for carrying into execution *all* the powers of government. Instead, the administrative agencies would make "laws," or more accurately *use* the "laws" to carry out such policy decisions as the agencies might make or such political or economic purposes they might elect.

No longer would the people have an open forum (*i.e.* Congress) in which to petition the government for redress of grievances, nor would policy decisions be made by persons directly answerable to the people.

In a given policy controversy, many persons (such as the men under Petitioners' Plan and their non-working wives) are not represented before the Court. There is always a danger that they may be permanently

foreclosed not only from "their day in court" but also from "their day" in any *other* forum. This is a point addressed by no less authority than President Lincoln on no less an occasion than his first inaugural.[13]

By maintaining Congress as the proper forum for resolving competing legislative policy views the force and violence of "faction" may be lawfully restrained.[14] This is a problem with which the founding fathers were thoroughly familiar and which they acted to ensure.

If, for example, an ideological faction can through an agency, *use* a law of Congress to effect its own economic policy decisions (instead of being required to be faithful to the law itself) then the will of Congress (as expressed in that law) is no longer paramount and there is no restraint upon that faction.

The point is not academic.

---

[13]"At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." Abraham Lincoln, First Inaugural Address.

[14]The Federalist Nos. 9, 10 (Mod. Lib. Ed.):

> "By a faction, I understand a number of citizens . . . who are united and actuated by some common impulse or passion. . . ." (*Id.* p. 54.)
>
> "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mash its violence under the forms of the Constitution" (*Id.* p. 57.)
>
> "Theoretic politicians . . . have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions." (*Id.* at pp. 58-59.)

In its brief the EEOC frankly urges that its positions or perceptions "evolve" (*i.e.* change) and that it or the courts not only can but should *cause* the law to "evolve" according to the EEOC's changing perceptions and positions. (U.S. Br. p. 31 fn. 27). In fact, in the same context, EEOC cites the 1972 Senate Report which is almost a verbatim copy of the House majority report on this point. These reports were rejected by the joint conference action. (Pet. Op. Br. C-24-26.)

The report said "experts" now perceived problems differently. But *Congress* did not. And Congress duly decided *not* to change the statute to define unlawful discrimination to suit such perceptions or to permit the "experts" to exercise that authority. In fact its Conference action expressly reaffirmed the jurisdictional limitations for this reason. (Pet. Op. Br. Ex. C-26.)

The issue, moreover, appears *not* to be *personal* discrimination, but economic regulation *per se*.

Respondents similarly rely on the House Committee Report of the rejected 1972 bill to advance their position. But the bill this report refers to was rejected. Hence this is simply a call on this forum to legislate what the legislative forum did not.

Further, another *Amicus* urges that since the "Esch Amendment" failed, this means Congress intended to regulate pensions and differentiations based on sex. (U.A.W. Br. p. 41.)

The opposite is true. The Esch Amendment was proposed to restrict the application of the broad prohibitions of a proposed House Bill if that broad proposal should not be rejected. Since that broad prohibition was rejected, the Esch restriction was unnecessary since

existing law does not regulate pension systems or differentials based on sex.

The point again is that having proposed broad legislation concerning pension systems and sex discrimination and having lost in Congress, the EEOC thereupon issued "sex guidelines" in 1972 and has sought in a judicial forum to have Title VII so amended.

Here the EEOC (the agent) is independent of the executive branch, and so is called an independent agency, but it is not independent of Congress. The agent's only proper recourse is to its own principal. To seek a change of the terms of its agency in another forum than Congress is to fail to be faithful to the expressed will of its own principal.

". . . Agency power . . . carries with it the responsibility not only to remain consistent with the governing legislation . . . but also to employ procedures that conform to the law." *Morton v. Ruiz,* 415 U.S. 199, 232 (1973).

Similarly, this Court has on several occasions rejected guidelines of the EEOC either expressly or by implication of this Court's holding on a particular point. The response of the EEOC to the Court's rulings has never been (so far as we are aware) to amend its guidelines to conform to such rulings in order that the public be accurately informed.

Rather the EEOC has either ignored this Court's rulings or has issued new pronouncements which nullify, in effect, the holdings of this Court.

Even the judiciary can be misled by such agency pronouncements as in the instant case for example. And when the lower courts are told by the agency

that they *must* "defer" to the agency, it is necessarily difficult for such courts to hear the voice of *this* Court, to which they are constitutionally subject.

Examples of EEOC action follow:

1) Compare 29 C.F.R. § 1607.3 (EEOC definition of "discrimination" as involving "protected classes" *with* Title VII, § 703(a)(2)) *prohibiting* classification.

2) Compare *Espinoza v. Farah Mfg. Co.,* 414 U.S. 86 (1973) *with* 38 Fed. Reg. No. 149, Aug. 3, 1973, and 29 C.F.R. § 1606.1 ("amendment" nullifying decision).

3) Compare *Teamsters v. United States, supra,* and *United Airlines Inc. v. Evans,* 431 U.S. 553 (1977) *with* "Interpretive Memorandum" (nullifying all factors that might show a good faith seniority system) CCH EPD ¶ 5029, July 1977, pp. 3104, *et seq.*

4) Compare *Weber v. Kaiser Aluminum & Chem. Corp.,* 563 F.2d (5th Cir.) decided November 17, 1977, *with* "Interpretive Regulations Guidelines" 42 Fed. Reg. 64826, dated December 28, 1977.

5) Also note *Griggs v. Duke Power,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) (new "guidelines" issued *after* certiorari was granted and attached to a brief, precluding other parties from Freedom of Information Act or other process to make a record on their background or content).

The effect of EEOC guidelines may be to prejudice the views of District Court judges (as in the instant case so that the defendant can scarcely expect an independent, impartial *de novo* hearing. Thus, the 1972 EEOC guideline on "sex" leads to the conclusion (if one assumes that EEOC has *any* legal jurisdiction to issue such pronouncements) that differentiation upon

the basis of sex whether "rational or irrational" is unlawful even though the *statute* says the opposite.

Moreover, the matter of "testing guidelines" does not pose a special problem. Courts have proved themselves competent to pass on questions of test reliability and test validity. *Almassy v. L.A. County Civil Service Com.*, 34 Cal.2d 387, 210 P.2d 503 (1949).

In a judicial forum the guidelines on testing seem only to take from the trial judge the responsibility to make rational decisions, or to force irrational decisions because of certain assumptions of statistical methodology, which are not always recognized as mere methodological assumptions. Morrison and Henkel, *The Significance Test Controversy* (1970, Aldine Publishing Co.). Employment decisions involve classifications and judgments in individual cases; and since that is the nature of a lawyer's business also, we cannot imagine that the problems of employment discrimination are "too complex" or the statute too obscure, to require agency "guidelines" to direct the decision.

Because the issue is important, the background of the "guidelines" on testing and certain other aspects of the subject are addressed in the appendix attached hereto.

We would submit that if "guidelines" only state when the agency believes it has *reasonable cause* to believe that a violation has occurred, it has fulfilled its function when all know that is its function and it has no place in a *de novo* proceeding.

Accordingly, we submit the Court should hold both as a matter of law and equity, and as a matter of efficient administration of law that the "guidelines" and "bulletins" are without legal effect at least against

local governmental entities. Holding herein that bulletins and guidelines are entitled to no weight *against* a defendant will greatly facilitate the administration of laws. Even the EEOC will benefit. It can then clear up its backlog of cases because it can cease the laborious and totally unnecessary process of writing "opinions" as to when "reasonable cause" is found, which opinions (according to their mentor) are written for the sake of influencing the courts (Blumrosen, Op. Cit., *supra* p. 733).

IV

UNDER THE FOURTEENTH AMENDMENT, CONGRESS MAY NOT REGULATE BENEFITS PROVIDED IN PENSION PLANS OF LOCAL GOVERNMENT ENTITIES OR IMPOSE ANY STANDARD REGARDING COMPENSATION, EXCEPT UNDER A RATIONAL BASIS STANDARD.

Respondents cite the case of *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717 (1966), in opposition to Petitioners' position. Actually that case supports Petitioners.

"Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach, supra* p. 651.

We submit that since the question *whether* to enact legislation under the 14th Amendment is a decision for Congress to make, and since Congress has elected

not to legislate with respect to the pension systems of local governments, the present statutes may not be extended to that subject matter. Nor may Congress adopt legislation which exceeds its 14th Amendment equal protection powers. *Katzenbach, supra* p. 651 fn. 10.

We submit that if Congress were to enact a statute, ostensibly under its 14th Amendment power, determining that blacks or yellows or whites not be permitted access to the federal courts for the purpose of remedying denial of their civil rights, this Court could not constitutionally enforce such legislation.

Having been added to the Constitution, the 14th Amendment, just as any other amendment to the Constitution, becomes a part of an integrated writing, and must be construed with other provisions such as the 10th Amendment.

What then is the standard of equal protection which limits Congress under the Constitution? We respectfully suggest it is the same standard it has always been, the standard set for all other legislation under the 14th Amendment—rational basis, or in certain areas compelling governmental interest.

Thus we question whether Congress could enact a law favoring females over males without a rational basis therefor *under* its 14th Amendment power.

If Congress did not or could not act under the 14th Amendment then it acted under another power such as the Commerce Clause. Where Congress acts under the Commerce Clause, however, if it invades an area reserved to local government it violates the 10th Amendment. *League of California Cities v. Usery, supra,* 842-844.

As stated by Justice Black in *Oregon v. Mitchell,* 400 U.S. 112, 128 (1970):

> "[T]he power granted to Congress was not intended to strip the states of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole nation."

Thus, assuming that Congress intended to act within its 14th Amendment powers, it intended no different meaning to discrimination than was the common understanding in 1964. And, as previously noted, Congress did not mean to change that in 1972.

This Court recognized that principle in *General Electric, supra,* p. 145 and at least one District Court agrees. *Blake v. City of Los Angeles,* 435 F.Supp. 55, 63 (C.D. Cal. 1977) on appeal in the Ninth Circuit.

We submit therefore, that examined under the rational basis review standards, the retirement system passes muster.

V

RESPONDENTS FAIL TO SHOW ANY CONVINCING REASON FOR THE COURT TO REVERSE ITS RECENT DECISIONS RESPECTING DIFFERENTIAL AMOUNT OF COMPENSATION BASED ON A FACTOR CORRELATED WITH SEX.

The Respondents and their amici curiae constitute a Greek chorus for the proposition that the Supreme Court was wrong in its interpretation of the statute in the *General Electric* case. Together they seek to have this Honorable Court reverse itself.

In order to do that, the Court must ignore the will of Congress, ignore the plain language of the statute, disregard the opinions the Court has set forth in *General Electric* and in *Nashville Gas Co. v. Satty* (*supra*), and disregard the numerous agencies—federal, state, local and private—which plainly disagree with Respondents' interpretation of the statute.

Even if we were to concede, which we do not, that there is any legislative support at all for Respondents' position, the opposing evidence is so strong that at best this Court should return the matter to Congress to determine whether that body in fact wishes to enact the kind of legislation sought by Respondents. While Respondents conceded the issue of females' longevity as supported by the record, and do not question the actuarial basis for funding male and female pensions under the Plan, their briefs and those of the amici are replete with suggestions that there is little or no difference. (The very statement of Respondent, Alice Muller, that there are approximately 400 women who are surviving spouses of Department employees and 3 men who are surviving spouses of female employees receiving benefits under the retirement plan would appear to be further evidence of the degree of difference in longevity.) (App. p. 44.)

This Court recognized the cost of pregnancy benefits as a factor correlated with sex, the denial of which benefits, despite such correlation, was not a violation of the Equal Pay Act. The Court recognized that differences in industrial benefit plans could clearly continue in operation under Title VII where allowed by the Equal Pay Act. The Court relied in part for its determination on a ruling of the Department of Labor which implicitly provided that if basic wages

were the same, the fact that an additional benefit was not provided for pregnancy to the only group that could be affected, namely, females, it would not violate the Act. The particular ruling relied upon recognized, as did the Court by implication, that longevity was a "factor" other than sex allowed as an exemption from the Act. The Court stated:

> "When Congress makes it unlawful for an employer to 'discriminate . . . on the basis of . . . sex . . .', without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant. . . ." *General Electric, supra* p. 145.

The respondents suggest an approach which would provide for a system having a disparate impact on males either by subsidy of the females or greater pay for the females. If your petitioners' Plan violated Section 703(a)(1) then, surely, this disparate impact would violate Section 703(a)(2) where as here it is a just a subterfuge to discriminate against one sex or the other. The sole purpose would be to favor females.

This Court has already held that federal legislation *favoring* one sex over the other violates equal protection where there is no rational basis therefor. *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Can this Court now hold that it is constitutional for the Court herein but not Congress to favor women? It can only do so if there is a rational basis to *favor* women. *Kahn v. Shevin*, 416 U.S. 351 (1974); *Schlesinger v. Ballard*, 419 U.S. 498 (1975). Such recognition

of a rational basis would be, *a fortiori,* recognition of female longevity as actuarially acceptable.

If recognition of female longevity is thus acceptable, then so is the Plan of your petitioners.

The opponents want the Court to weigh competing interests in favor of the female employees. They suggest that a plan which favors females would not violate the statute because it is permissible to have larger groups covered identically under employee benefit plans. They argue that this is so because it is a normal principle of insurance that one person may lose and another win from the insurance standpoint even though the risk may affect one more than the other because the particular factor affecting that particular person is not taken into account in the group. They suggest that even though that factor is sex as related to longevity, it is allowed under the statutes because it is "neutral", as if such factor could be neutral. On the other hand, they argue that to allow grouping to avoid the impact on the sex with the higher risk factor is discriminating for the purpose of sex, and sex alone. We have difficulty seeing the difference. It appears to us that in either case one is differentiating on the basis of sex.

In terms of groups, clearly the systems suggested by the respondents favor women. They do not provide for neutral treatment, no matter what arguments are made. And, because insurance and annuity risks are not known on an individual basis it would logically seem that they favor each individual female over each individual male.

In terms of groups, the employer plans challenged herein and in similar cases (*Colby, supra; Henderson*

v. Oregon, 405 F.Supp. 1275 (1975) on appeal to the 9th Circuit, *et seq.*) treat risks not neutrally, but equally.

This Court is being asked to hold, in effect, you may not differentiate between men and women but you may discriminate against men. We submit the Court should not make such determination. Accord: *General Electric Co. v. Gilbert* and *Nashville v. Satty.*

Conclusion.

Having conceded the different wage payments are for different pension payments and having conceded the actuarial bases of the Plan, and having raised no contention that the Plan is a subterfuge to discriminate against females, respondents took the position that mere differentiation in contributions is sufficient to violate the Acts. Respondents failed to indicate how such mere differentiation was a violation of the statutes where it was based on sex-differentiated actuarial tables.

Therefore, they and their supporting amici take the position that the Court should hold contrary to the statute by setting a policy that was never set by Congress. They ask the Court to legislate contrary to its Constitutional duty, in the same fashion that the courts below were led to abdicate their responsibilities and so legislate by totally deferring to administrative agency bulletins.

In so doing, respondents also ask this Court to remove from local government and local control, the administration of the City's pension plan, where Congress has chosen not to so do.

We respectfully petition this Court to reverse the decision of the lower courts and direct the District Court to enter judgment for petitioners.

Respectfully submitted,

BURT PINES,
City Attorney,
EDWARD C. FARRELL,
Chief Assistant City Attorney for Water and Power,
J. DAVID HANSON,
Deputy City Attorney,
DAVID J. OLIPHANT,
Deputy City Attorney,
By DAVID J. OLIPHANT,
Deputy City Attorney,
Attorneys for Petitioners.

APPENDIX.

Employment Testing and Judgments; Judicial Tests and Judgments.

About 1955, professional educators and psychologists published technical recommendations regarding the development of achievement, psychological, and diagnostic tests. In 1966 (following the enactment of the Civil Rights Act) the professional societies jointly published technical recommendations. Earlier recommendations had been an attempt to develop, formulate through a survey or polling method, some consensus of the information which a test user would find helpful. The 1966 recommendations were a reformulation of those recommendations.

The new recommendations were titled "Standards for Educational and Psychological Tests and Manuals" of the American Psychological Association.

The recommendations fully recognized that many tests were then fully developed and would be "released for practical publication without local validation". (Ibid. p. 3) A test manual containing the publisher's report of experiments, studies or "tests of his test" (so to speak) was to supply a basis for intelligent judgment by the test user.

In describing the "Development and Scope of the Standards" the published document explains that "the present effort is concerned with standards of reporting information about tests". (Ibid. p. 1) "[T]he essential principle that sets the tone for this document is that a test manual should carry information *sufficient to enable any qualified user to make sound judgments regarding the usefulness and interpretation of the test*". (Ibid. p. 2) "Tests released for operational use . . .

should be released to the general user only after their developer has gathered information *which would permit the user to know for what use the tests can be trusted.*" (Ibid. p. 4) (Emphasis added).

Thus the major premise of the recommendations was that the publisher should test his professional judgment as to test reliability, validity, interpretation and other matters by certain analyses, studies (perhaps including statistical studies) before releasing the test; that the manual accompanying the test should show the results of the studies actually conducted; and that the test selector and user would then have an evidentiary basis to make informed judgment on such matters in relation to his own situation.

Later the same year (1966) the EEOC published "Guidelines on Employment Testing Procedures". The document consisted of three parts: (1) a general introduction, (2) "The General Guidelines of the Commission", and (3) a "Report by a panel of psychologists".

The first two parts of the document are a statement of what the Commission "advocates" or "recommends" or "encourages". Similarly the report by the panel of psychologists states that the Commission "has asked us to advise it" . . . concerning the process by which tests should be *developed* and administered in an employment setting." (Emphasis added). The report states "we recommend that the Commission *advocate* the use of a total personnel assessment system". One part of such system was said to be a "test", but "interview" etc. were also mentioned.

The Panel's Report contained many headings, but the most significant is "criterion-related validity". Under this heading the report stated that "tests should

be selected on the basis of validation against the performance requirement of the job, that is, criterion-related validity."

Thus this recommendation was in direct conflict with principles of the 1966 professional standards. It recommended a local validation study as the basis for *selection* of a test. In contrast the 1966 professional standards contemplated that tests should be selected and used without such local validation studies. Instead the test manual of the publisher "would permit the user to know for what use the test can be trusted". A.P.A. *Standards, supra*, p. 4.

The 1970 EEOC guidelines on testing, further expanded the matter. While the earlier on document focused on "tests" in the ordinary sense, the later guidelines newly defined "tests" so that it included *every* employment standard and its application: "The term 'test' includes *all* . . . techniques of assessing job suitability including . . . work history requirements, scored interviews . . . etc." 29 C.F.R. §1607.2.

There were other major differences in the new guidelines. For example they purported to require (even though not issued pursuant to the record keeping requirements of the statute) that "each person using tests (and tests are defined as any standard by which judgment is made) . . . shall have available for inspection evidence that the tests are being used in a manner which does not violate" the EEOC's definition of discrimination. 29 C.F.R. §1607.4.

A review of the entire testing guidelines shortly after their publication, evaluated them in the following terms:

> "In sum, the Guidelines appear *designed* to scare employers away from objective standards

which have a differential impact on minority groups because, applied strictly, the testing requirements are *impossible* for many employers to follow." Note "Developments—Title VII", 84 Harv. Law Rev., pp. 1109, 1131. (Emphasis added).

Moving from the employment decision context to the judicial context raises a further set of problems. This set of problems is caused by the totally "experimentalist" assumptions of the guidelines—the notion that *only* an experiment (or statistical study) resulting in statistical evidence of "criterion-related validity" provides a sufficient basis for concluding the standard (or "test") is "valid".

One who formulates or develops a "test" or employment standard — *e.g.*, "tall men are better basketball players than short men" is obliged (if he is a strict experimentalist as the "guidelines" require him to be) to "prove" that standard with a statistical study.

The statistical study begins by assuming that such rational judgment is merely a hypothesis, that it has a "null" validity. This does *not* mean that it is false in fact. It only means that for purpose of the experiment (the statistical study) it must be *assumed* for the sake of the experiment that there is only an absolutely random relationship between "tall men" and "better basketball players." Thus "zero" or "null" or "no" validity is simply a methodological assumption. Morrison and Henkel, *The Significance Test Controversy* (1970, Aldine Publishing Co., Chicago).

Suppose then, in the particular experiment attempted, the taller men and the shorter men do not have a significant difference as measured against the criterion: "better basketball players". Does that prove

the original rational judgment that "tall men are better basketball players" is false?

No, it only means the evidence obtained in the "study" was inconclusive. It is not sufficient to disprove the null hypothesis.

Note that the experiment is itself a test; and the *assumption* that the experiment will be useful is a rational judgment.

However, a trial judge, told in effect that he may not make a rational judgment on the bona fides, the validity, or the rationality of employment standards or decisions *unless* there is statistical evidence showing that the standard is significantly different than random selection, is necessarily forced into making non-rational decisions. This si especially true since under the "total experimentalist" view a statistical correlation is itself not a *rational* relationship, but merely one that "happens" at this time and place, to turn up as non-random.

The necessity for and value of experimental evidence is itself a matter of dispute among psychologists. The "clinicians" and the "experimentalist" schools of psychology hold differing views.

The judicial process, on the other hand, has generally not required any particular *kind* of evidence to prove the truth of any proposition of fact such as reliability and validity of employment standards and decisions. *Almassy v. L.A. County Civ. Serv. Com., supra.*

In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

Supreme Court, U. S.
FILED
NOV 16 1977
MICHAEL RODAK, JR., CLERK

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitoners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM AS AMICUS CURIAE

HARRY L. DU BRIN, JR.
New York State Teachers' Retirement System
143 Washington Avenue
Albany, New York 12210
Assistant Executive Director and Legal Advisor

KARL E. NISOFF, Counsel
WILLIAM B. JENSEN, Assistant Counsel
DAVID A. WEISS, Assistant Counsel

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 2

SUMMARY OF ARGUMENT 3

ARGUMENT

POINT I — WHEN VIEWED IN THE CONTEXT OF *GENERAL ELECTRIC V. GILBERT*, IT IS APPARENT THAT THE RESPONDENTS HAVE NOT SHOWN A GENDER-BASED DISCRIMINATORY EFFECT AT ALL 5

A. The Petitioners' plan provides as great an aggregate benefit to female employees as it does to male employees, therefore there is no gender-based discrimination at all in the present case 5

B. In the case before the Court, discriminatory effect is most relevantly measured by comparing risk classes, the individual members of which are grouped according to the quantum of risk which they introduce to the plan; viewed in this manner, it is apparent that there is no discriminatory effect against the employer's female employees..... 7

POINT II – THE LEGAL STANDARDS APPLIED BY THE COURTS BELOW VIOLATED THE PROVISIONS OF TITLE VII, AS REFLECTED IN THE LEGISLATIVE INTENT AND DECISIONS OF THIS COURT 11

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

PAGES

Albermarle Paper Co. v. Moody, 422 U.S. 405, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975) 15

Dothard v. Rawlinson, 45 United States Law Week 4888 (decided June 27, 1977) 15

Geduldig v. Aiello, 417 U.S. 484, 41 L. Ed. 2d 256, 94 S. Ct. 2485 (1974) ..... 3, 5, 6, 10, 13, 16.

General Electric v. Gilbert, 429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976) 3-7, 10, 11, 13, 15

Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971) 15

Washington v. Davis, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976) 16

Other Authorities

29 C.F.R. §800.116 (d) (1975) 12

110 C.R. 7217 16

Employee Benefits Journal, "Sex and the Single Table: Equal Monthly Retirement Income For The Sexes", B.J.Lautzenheiser, Fall 1976 ..... 8, 13

Life Insurance, 6th Edition, S.S. Heubner and Kenneth Black, Jr., page 441 8

Mortality Under Standard Ordinary Insurance Issues between 1972 and 1973 Anniversaries, Transactions, Societies of Actuaries, 1974 Reports Number, pp. 18-22 14

Statement of American Life Insurance Association and the Health Insurance Association of America in connection with HEW rules at p. 22 8-9

TIAA Participant, July 1973, p.3 14

U.S. Const., Amendment 14, §5 16

29 USC §206 (d) [29 USCS §206 (d)] 11

42 USC §2000e-2 (h) [42 USCS §2000e-2 (h)] 11

In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

BRIEF FOR THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM AS AMICUS CURIAE*

---

*This brief is filed with the consent of all parties pursuant to Rule 42 of the Court.

INTEREST OF AMICUS CURIAE

The New York State Teachers' Retirement System is a public retirement system organized under Article 11 of the Education Law of the State of New York. Its membership consists of public school teachers, certain members of the State University system and the New York State Education Department. It is the largest teacher retirement system in the United States, having more than 240,000 members. Under the plan the System administers, certain of its benefits are calculated on the basis of actuarial tables which are predicated on the experience amassed by this System during its 55 years of operation and are adjusted further on the basis of the sex of the intended beneficiary. The procedures employed by the System would be significantly affected by this case.[1]

---

[1]A requirement that public retirement systems change from separate gender-based actuarial tables to non gender-based actuarial tables would create serious financial consequences for the New York City and the New York State retirement systems. The Chief Actuary for the five New York City public retirement systems has estimated that were his systems required to substitute non gender-based tables for gender-based tables, the added annual costs for the taxpayers of the City of New York would be approximately $35 million. Similarly, the actuaries of the three New York State retirement systems have estimated their additional annual costs to be approximately $85 million. The use of such tables would result in the creation of an unfunded accrued liability in excess of $1.3 billion, which would be in additon to all other existing liabilities of the systems. Part of the indicated cost is attributable to Article 5, Section 7 of the New York State Constitution which reads as follows:

> "After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

In *Birnbaum vs. New York State Teachers Retirement System*, 1958, 5 N.Y. 2d 1, 176 N.Y.S. 2d 984, 152 N.E. 2d 241, the New York State courts were asked to determine if the constitutional guarantee applied as well to actuarial tables in effect at the time a member joined a public retirement system if such tables produced a better benefit than would a table subsequently adopted by the retirement system. The Court of Appeals decided that the constitutional guarantee applied as well to the use of actuarial tables. As a consequence, all benefits based on actuarial tables had to be computed on the basis of actuarial tables in effect at the time a member joined the plan rather than on the basis of updated

SUMMARY OF ARGUMENT

I. The Court's reasoning in the case of *General Electric v. Gilbert*, 429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976) compels a finding of no unlawful employment practice in the case now before this Court. As in *Gilbert*, the employer's female employees receive benefits which are at least as great, in the aggregate, as the benefits received by the employer's male employees. In order to establish a *prima facie* discrimination case under Title VII, it is necessary to demonstrate the existence of a discriminatory effect. Under the standard laid down in *Gilbert* and *Geduldig v. Aiello*, 417 U.S. 484, 41 L. Ed. 2d 256, 94 S. Ct. 2485 (1974) it is proper to measure discriminatory effect in employee benefit plans which must rely upon statistical and actuarial methods, not in terms of each individual participant, but rather in terms of relevant risk classes which are differentiated from each other on the basis of the burden placed upon the plan by each class. Viewed in this context, it is apparent that the employer's female participants, with their greater average longevity, impose a greater burden upon the retirement plan than the male employees. This is especially true where, as here, monthly benefits are the same for females as for similarly qualified males. By requiring greater employee contributions from female employees, the Petitioners have endeavored to equalize the relative impact upon the plan occasioned by the statistically provable differeces in longevity between the two sexes. Thus, the Petitioners' plan is equitable both in terms of aggregate risk protection, and in terms of the burden borne by each risk class, and, therefore, meets the standard laid down by the *Gilbert* and *Gedulig* cases.

(continued from preceding page)

actuarial tables. As a result of the Birnbaum decision, affected retirement systems in New York State were required to recalculate benefits awarded prior to the judicial pronouncement. We understand that in compiling the estimated costs of converting to non-gender-based tables, the New York State and City actuaries have not estimated the cost of retroactive adjustments of benefits previously awarded, which, if required, would substantially increase the systems' unfunded accrued liabilities.

BEST COPY AVAILABLE

II. The legislative history of Title VII demonstrates that Congress did not intend to preclude gender-based differences of treatment in industrial benefit plans, where such differences are supported actuarially. More specifically, the legislative history of the sex discrimination provisions of Title VII, which was fully reviewed and interpreted by this Court in the *Gilbert* case, indicates congressional intent to preserve the right of retirement systems to implement separate gender-based tables in the computation and determination of pension contributions and benefits.

In the case at bar, the judgments of the courts below were inconsistent with the determination of this Court in *Gilbert* and the legislative interpretations made therein. The courts below also erred in denying the Petitioners an opportunity to present evidence by way of actuarial considerations which would justify the use of separate gender-based tables. The Petitioners at a minimum, were entitled to a trial on the issue of whether the retirement plan they administer was justified on the basis of recognized actuarial tables which show the difference in longevity between males and females. The refusal of the courts below to conduct such a trial contravened the decisions of this Court in that it deprived the Petitioners of their rights to establish any legal defense or justification for the use of seperate gender-based tables.

POINT I

WHEN VIEWED IN THE CONTEXT OF *GENERAL ELECTRIC V. GILBERT*, IT IS APPARENT THAT THE RESPONDENTS HAVE NOT SHOWN A GENDER-BASED DISCRIMINATORY EFFECT AT ALL

A. The Petitioners' plan provides as great an aggregate benefit to female employees as it does to male employees, therefore there is no gender-based descrimination at all in the present case.

At the outset, Petitioners assert that this Court's decision in the *Gilbert* case is directly in point and compels a reversal of the decision of the Court of Appeals in the instant case. In both the *Gilbert* case and the present case, employee benefit plans are involved which require, for their implementation, reliance upon actuarial techniques and statistical data. In the present case, as in *Gilbert*, an employer is being charged with an unlawful employment practice in administering an employee benefit plan, notwithstanding the fact that the employer's contributions to the plan in this case are at least as great for female employees as for similarly qualified male employees. This Court's statement in *Geduldig* that,

> "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program." 417 U.S. 496, 94 S. Ct. 2492, 41 L. Ed. 2d 264

is precisely in point in the instant case. Just as in *Geduldig* and *Gilbert*, the employer's contributions to the benefit plan in this case provide a benefit which is at least as great in the aggregate for females, as for males. Also, as in *Geduldig* and *Gilbert*, it is indisputable that "the fiscal and actuarial benefits of the program ...accrue to members of both sexes", *Geduldig* at 417 U.S. 497 n.20, 94 S.Ct. 2492 n.20, 41L. Ed. 2d 264, n20. In fact, in the instant case, the *actuarial* benefit accruing to the class of female employees is greater than that for male employees, since not only do female retirees receive the same periodic benefits under Petitioners' plan as similarly qualified male retirees, but the

female employees, as a class, can be expected to live considerably longer than their male counterparts; thus the female retirees will receive greater aggregate benefits.

It is for this reason that the Petitioners in this case require an additional contribution from female employees, i.e. to help in funding the greater aggregate benefit accruing to the class of female employees. However, this hardly constitutes impermissible discrimination since it is undisputed that the employer's contributions to the benefit plan are in fact even greater for females than for similarly qualified male employees, and, even without the additional contributions made by the female employees to the plan, the aggregate protection derived by the class consisting of all the employer's female employees is at least equal to that enjoyed by the male employees. In other words, the plan administered by the Petitioners in no way works to "discriminate against any definable group or class in terms of aggregate risk protection derived by that group or class from the program," (either in terms of employer contributions to the plan, or in terms of the aggregate benefit derived by either group). *Geduldig* at 417 U.S. 496, 94 S. Ct. 2492, 41 L. Ed. 2d 264. Hence, the facts fail to support a finding of gender-based discrimination at all in this case, and a Title VII violation cannot lie. This is exactly the same conclusion reached by the majority of this Court in *Gilbert* where, after noting that there was no differentiation by General Electric in terms of the aggregate protection provided to its female employees as a class, it stated:

> "Since it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice . . . , *Geduldig* is precisely in point in its holding that [General Electric's disability plan] is not a gender-based discrimination at all." 429 U.S. 136, 97 S. Ct. 408, 50 L. Ed. 2d 354.

Finally, in this connection, it is significant to note, as Justice Kilkenney did in his dissenting opinion in this case in the Court of Appeals, what this Court said in *Gilbert* of the cost to General Electric of its benefit plan:

> "Absent proof of different values, the cost to 'insure' against the risks is, in essence, nothing more than extra compensation to the employees, in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the 'insurance', there would clearly be no gender-based discrimination . . . While respondents seem to acknowledge that the failure to provide any benefit plan at all would not constitute sex-based discrimination in violation of Title VII ..., they illogically also suggest that the present scheme does violate Title VII..." 429 U.S. 139, n. 17, 97 S. Ct. 409 n. 17, 50 L. Ed. 2d 356, n. 17.

Nothing could be more descriptive of the circumstances in the present case. Just as in *Gilbert*, if the employer, instead of providing a retirement plan for its employees, elected to increase wages by the amount it contributes to the cost of the plan, the female employees would actually be better compensated than similarly situated male employees. This results from the fact that the employer is actually contributing more on behalf of each female employee than it is for each male employee. To assert that the Petitioners are, nevertheless, unfairly discriminating against female employees grossly distort the meaning and intent of Titles VII and the Equal Pay Act, as *Gilbert* demonstrates. Clearly, there is no discriminatory effect in the present case which works against female employees.

B. In the case before the Court, discriminatory effect is most relevantly measured by comparing risk classes, the individual members of which are grouped according to the quantum of risk which they introduce to the plan; viewed in this manner, it is apparent that there is no discriminatory effect against the employer's female employees.

The Respondents object to being considered as members of a class, i.e. the class of all female employees, for the purpose of aiding in determining their retirement allowances. Respondents argue that this constitutes an impermissible stereotyping of members of their sex which violates the standards thus far laid down by this Court. While, at first glance, this argument may appear to have some merit, a closer look at some of the

circumstances prevailing in the instant case reveals this to be an extremely simplistic argument, and one which ignores fundamental differences between this case and past disputes arising under Title VII involving sex discrimination. Absolute individual equity is seldom attainable in any type of insurance or pension program. However, in order to come as close as possible to individual equity, individuals are grouped together in terms of the amount of risk they contribute to the plan, and their required contributions to the plan are determined accordingly.

In "Life Insurance," 6th Edition, by S.S. Heubner and Kenneth Black Jr., New York: Appleton — Century Crofts, page 441, it is stated:

> "In any insurance plan, each insured person contributes to a common fund . . . In order to maintain equity between different classes of policyholders, each insured should contribute according to the risk which he transfers to the common fund. If one person is allowed to pay less than his share, it will necessitate an overcharge against other persons in order to keep the common fund solvent...."

The relevant actuarial principles involved in the administration of retirement and pension plans are embodied in the above quotation.[2] In a pension plan, as in life insurance, longevity tables form a basis for evaluating prospective risks. Also, in a pension fund, a very real risk is being insured against, that is, the risk of having one live one's later years in financial insecurity. That females have a demonstratably longer life expectancy makes this risk greater for females than for males, hence the desire of plan administrators to distribute some of the additional burden attributable to this risk back to the group which introduces it.[3]

[2]For an in-depth analysis of this insurance principle, see Barbara J. Lautzenheiser, FSA. "Sex and the Single Table: Equal Monthly Retirement Income For the Sexes?", Employee Benefits Journal, Fall, 1976, published by the International Foundation of Employee Benefit Plans. This concept is also explained in a statement made by Richard Minck in behalf of the American Life Insurance Association and the Health Insurance Association of America on October 15, 1974 in connection with HEW proposed rules at page 22:

> "[I]n the insurance context, equity has meaning only for

Indeed, when viewed in its most fundamental form, the real basis for differentiation in actuarial tables is not sex at all, rather it is life expectancy. In most life insurance programs, as well as retirement plans, it is this crucial factor which is essential for sound benefit planning. And herein lies the major difference between this case and the vast majority of cases arising under Title VII before this Court in the past; that is, in past disputes it has almost always been possible for an employer to evaluate each employee's qualifications and pay demands individually, and Title VII fairly requires nothing less where such an evaluation is reasonably possible. However, an employer providing benefits which require the evaluation of various insurance-related principles, including longevity, finds that individual analysis is not only commercially impractical — it is impossible. Yet some type of evaluation of longevity in a retirement program is essential to maintain the continued solvency of the fund, and it is urged that the current, universally accepted actuarial method most fairly accomplishes this evaluation by differentiating

(continued from preceding page)

> groups. Within each such group, some individuals will receive more than others and some will receive less than others, but all will have the risk they insured against equitably covered . . . Group equity, not individual equity, is necessary for the insurance principal to function."

[3]It should be noted that basically there are two correllative ways the plan administrator can compensate for the additional burden attributable to the female participants' longer life expectancy. One is to provide equal monthly benefits to similarly qualified male and female employees, and require greater contributions from the female participants in order to help fund the greater aggregate benefit derived by the class of female participants. This is, in essence, the method adopted by the Petitioners. The other approach, adopted by many plans, is to reduce the periodic benefit received by female participants to compensate for their greater longevity, thereby equalizing the aggregate benefits derived by both sexes. Under this approach, employee and employer contributions may be identical for similarly qualified employees, regardless of sex. Both methods, however, are merely analogs of each other and accomplish the same objective, that is, they both fairly relate the aggregate benefit derived by an identifiable risk group, to the burden or risk contributed by that group.

between substantially disparate groups in terms of life expectancy, thereby preventing cross-subsidization of dissimilar classes (subsidization of the female employees by the males would be inescapable if the Petitioner were forced to use unisex tables since the cost of the plan for females would remain greater than that for males; only the tables would change, the life expectancy differential and actual cost allocations would remain the same). Clearly then, in a retirement program such as the Petitioners', group equity most closely approaches individual equity, and prevents one identifiable risk group from being compelled to subsidize another.

In fact, in view of the above, were unisex tables mandated, the Petitioners would have a plan, which, though perhaps facially neutral, would discriminate against male employees by requiring them to subsidize a greater risk group. Viewed in this context, and we submit that in an annuity program it is the *only* workable context, no one group is being discriminated against since each risk group is indeed pulling its own weight.

This, it is submitted, was recognized by this Court in both the *Geduldig* and *Gilbert* cases when it stated:

> "There is no evidence in the record that the selection of risks insured by the program worked to discriminate against any definable group or class in terms of the *aggregate risk protection derived by that group or class* from the program." 417 U.S. 496, 94 S. Ct. 2492, 41 L. Ed. 2d 264 (emphasis added)

It is for this reason that the New York State Teachers' Retirement System, as *amicus curiae*, respectfully urges this Court to find that its decision in *Gilbert* is controlling in the case at bar, and necessitates a dismissal of the charges since there is no discriminatory effect against the employer's female employees.

POINT II

THE LEGAL STANDARDS APPLIED BY THE COURTS BELOW VIOLATED THE PROVISONS OF TITLE VII, AS REFLECTED IN THE LEGISLATIVE INTENT AND DECISIONS OF THIS COURT

Title VII, §703 (a) (1) includes provision that it shall be an unlawful employment practice for an employer

> ". . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin", 42 USC § 2000e-2[42 USCS §2000e-2].

This Court noted in *Gilbert*, 429 U.S. 125, 143, 50L. ED. 2d 345, 358, 359, 97 S. Ct. 401 (1977), that despite the brevity of the sex discrimination prohibition of Title VII, that Congress paid special attention to the provisions of the Equal Pay Act, 29 USC §206(d) [29 USCS §206(d)] when it amended §703 (h) of Title VII by adding the Bennett Amendment, which provides as follows:

> "It shall not be an unlawful practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29." 42 USC §2000e-2(h) [42 USCS §2000e-2(h)]."

As this Court noted in *Gilbert*, at 429 U.S. 125, 144, 50 L. ED. 2d 343, 359, 97 S. Ct. 401, Senator Humphrey, the floor manager of the bill, stated "that the purpose of the amendment was to make it 'unmistakably clear' that differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill if it becomes law."

It is respecfully submitted that in this case, the Court of Appeals, in denying Appellant's request for a rehearing, overlooked the import of and failed to follow this Court's decision in the *Gilbert* case. The Court of Appeals practically ignored the legislative history which was emphasized by this Court in the *Gilbert* case. Specifically, the Court of Appeals

attempted to summarily dismiss as irrelevant, an interpretative bulletin promulgated by the Wage and Hour Administrator under the Equal Pay Act, which bulletin was quoted by both this Court in *Gilbert* and by Circuit Judge Kilkenney in his dissent, in the instant case, in the Court of Appeals. That bulletin provides as follows:

> "If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees." [29 CFR §800.116(d) (1975)].

The quoted bulletin, relating to employee benefits demostrates that no statutory violation results from the *bona fide* use of separate actuarial tables in the computation of pension, insurance and other employee benefits. As Judge Kilkenney stated in his dissent in this case in the Court of Appeals:

> "In the context of pension plans, this rule makes sense only if it is read to impliedly authorize the funding of employee pension plans upon the basis of separate mortality tables. This regulatory justification for a plan with equal contributions and unequal benefits cannot be ignored in the variation before us."

It is significant to note that the variations countenanced by the bulletin promulgated by the Wage and Hour Administrator are of such a nature as to nevertheless insure equitable treatment to both of the sexes. In the case at bar, Respondents contend that they, as women, have been the victims of invidious discrimination. That contention overlooks the fact that the effect of separate tables is often to provide women with justified advantages in certain areas; particularly in life insurance, where females have more favorable rates than males. Furthermore, the abolition of seperate tables in favor of unisex tables constitutes an unrealistic mandate to ignore a real difference between the

sexes and can only result in invidious discrimination against each of the sexes. The arguments made in support of this conclusion are cogently set forth in a paper entitled "Sex and the Single Table: Equal Monthly Retirement Income For The Sexes?".[4]

The differences in contributions and benefits, which result when pension plans implement separate actuarial tables, are neither male nor female oriented. Although these differences do in particular instances require or result in a disparity in their impact on the respective sexes, they are by no means a "pretext designed to effect an invidious discrimination against the member of one sex or the other." *Geduldig* and *Gilbert, supra.*

The distinctions in contributions and benefits are the product of a real life expectancy difference between the sexes; a difference, which is so uniformly acknowledged, that it is a proper subject of judicial notice; a difference which was reflected in uncontroverted affidavits in the District Court in the instant case (see J. Kilkenney's Dissent in the Circuit Court of Appeals); a difference which has been recognized to be biological in origin; a difference which was confirmed in a study showing that the life span of monks and nuns, living similar lives, was about the same as the population as a whole [TIAA Participant, July,1973 p. 3, citing Madigan, "Are Sex Mortality Differentials Biologically Caused?" Milbank Memorial Fund Quarterly, Vol. 35, pp. 203-223 (1957)]; a difference confirmed by lower female mortality rates at all ages "Mortality Under Standard Ordinary Insurance Issues between 1972 and 1973 Anniversaries," Transactions, Societies of Actuaries, 1974 Reports Number, pp. 18-22); and a difference that is so pervasive that it has been stated:

> "All mortality statistics, whether U.S. population surveys, Social Security statistics, annuitant death rates, life insurance experience, or world-wide health studies, show clearly that at all ages women's average life expectancy is substantially longer than men's."

---

[4]Lautzenheiser, FSA, *supra* note 2.

> "The consensus [is] that the mortality differential between men and women cannot be satisfactorily explained by environmental, occupational, or economic differences, and that women do have an innate biological or genetic advantage over men." (Teachers Insurance and Annuity Association — College Retirement Equities Fund, *The Participant*, July 1973, p. 3)."

Although some of the foregoing facts obviously are not part of the record, they are indeed significant since they would have been the proper subject of expert testimony at a hearing. However, no opportunity to present such facts was ever provided because the District Court granted summary judgment. The right of the Petitioners to present such facts and the need for the Courts to consider them was specifically recognized by J. Kilkenney when he stated in his dissent below:

> "I am convinced that the legal principles ennunciated in *General Electric Co. v. Gilbert*, (429) U.S. (125), (Dec. 7, 1976), are here controlling and that the district court erred in granting summary judgment against the appellants. *At a minimum, the court should have conducted a trial on the issue of whether the appellants' retirement plan was justified on the basis of recognized actuarial tables showing the difference in longevity between males and females.*" (emphasis added)

In the case at bar, the majority, in denying the motion for rehearing, concluded that the plan in question was "facially discriminatory". The majority found it unnecessary to provide the retirement system with an opportunity to present proof in justification of its plan. Amicus, as indicated, contends that the plan in question is non-discriminatory. However, even assuming arguendo, that the plan of the retirement system, including the use of separate tables appeared to be discrimatory, it is respectfully submitted that the retirement system was legally entitled to an opportunity to demonstrate that its plan was actuarilly justified; and that in any case the determination of the majority in the Court of Appeals granting summary judgment violated the principles set forth by this Court in *Gilbert*, 429 U.S. 125, 137, 50 L. Ed. 2d 343, 355, 97 S. Ct. 401, footnote 14[4b] as follows:

> "In *Griggs, supra*, the burden placed on the employer 'of showing that any given requirement must have a manifest relationship to the employment in question,' 401 US, at 432, 28 L. Ed. 2d 158, 91 S. Ct. 849, did not arise until discriminatory effect has been shown, *Albermarle* 422 US at 425, 45 L. Ed. 2d 280, 95 S. Ct. 2362."

This Court also recognized and reiterated the right of an employer to establish a defense to a *prima facie* case of sex discrimination in the recent case of *Dothard v. Rawlinson*, 45 United States Law Week 4888, 4890, (decided June 27, 1977), where it was stated:

> "Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question.' *Griggs v. Duke Power Co.*, 401 U.S. at 432."

The legislative history of Title VII also reflects allowance for a rational basis justification for employment distinctions between the sexes. Senator Clark in presenting Title VII indicated in his explanation of the House Bill, "Furthermore, under Title VII, jobs can no longer be classified as to sex, except where there is a *rational basis for discrimination*, on the ground of *bonafide* occupational qualification." (emphasis added) It was likewise noted that under the House Bill "wherever sex is a *bona fide* job qualification or disqualification for a particular job, Title VII does not require that equal job opportunity be given to both sexes." (110 CR 7217)

It is also respectfully submitted that it was error to grant summary judgement in the absence of evidence to support a finding of purposeful discrimination; that a standard which did not require purposeful discrimination and did not permit a state or local government to prove a defense of justification to an alleged violation of Title VII would be unconstitutional. As originally enacted Title VII of the Civil Rights Act of 1964 applied only to private employers. The Act was expanded to include state and local governmental employers by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, eff. March 24, 1972. This was done pursuant to U.S. Const., Amendment 14,

§5 which granted the Congress the power to enforce the provisions of the Fourteenth Amendment by appropriate legislation.

The limits of Title VII, to the extent that Title VII is made applicable to state and local governments, cannot constitutionally exceed the limits of the Fourteenth Amendment; i.e. Congress, acting under a constitutional grant of power, could not enact legislation which was broader than or beyond the scope of the underlying constitutional grant of power.

Even in the more closely scrutinized area of racial discrimination, this Court has recognized that proof of discriminatory purpose is necessary to make out a discrimination cause of action under the Fourteenth Amendment of the Constitution. In the case of *Washington v. Davis*, 426 U.S. 229, 244, 245, 48 L. Ed. 2d 597, 610, 611, 96 S. Ct. 2040 (1976), this Court stated:

> "The cases impressively demonstrate that there is another side to the issue; but with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement."

And in *Geduldig supra*, this Court stated at 417 U.S. 484, 497, 41 L. Ed., 256, 265, 94 S. Ct. 2485, 2492 (1974) at Footnote 20, as follows:

> "Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this *on any reasonable basis*, just as with respect to any other physical condition." (emphasis added).

In contrast to the foregoing, the District Court in the case at bar stated at 387 F. Supp. 980, 984 (1975):

> "In short, under the Equal Employment Opportunity Act of 1972, all stereotypic treatment of persons based on race, religion, or sex whether *rational* or irrational is dead." (emphasis added)

It is respectfully submitted that the legal standard applied by

the District Court, as well as the Court of Appeals, was violative of the legislative history and legal decisions made by this Court in the field of discrimination; and it is further and alternatively submitted that to the extent that the standards of Title VII purport to exceed in their stringency the limits of the Fourteenth Amendment, they are unconstitutional. Accordingly it is respectfully submitted that the use of separate tables by public pension funds is non-discriminatory and consistent with the will of Congress under Title VII; or at the very least, consistent with the constitutional limits of congressional authority; and that in any case, it was error for the Courts below to deprive the retirement system of an opportunity by way of a hearing to establish a legally justifying defense.

CONCLUSION

The New York State Teachers' Retirement System, as Amicus Curiae, respectfully requests that the judgment of the United States District Court and the judgment of the United States Court of Appeals be reversed.

Respectfully submitted,

HARRY L. DU BRIN, JR.
New York State Teachers'
Retirement System
143 Washington Avenue
Albany, New York 12210
Assistant Executive Director
and Legal Advisor

KARL E. NISOFF, Counsel
WILLIAM B. JENSEN, Assistant Counsel
DAVID A. WEISS, Assistant Counsel

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES ET AL.,
Petitioners,

v.

MARIE MANHART ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE SOCIETY OF ACTUARIES AND THE AMERICAN ACADEMY OF ACTUARIES AS AMICI CURIAE

LAWRENCE J. LATTO
JOHN PARSONS WHEELER III
734 Fifteenth Street, N.W.
Washington, D.C. 20005

Attorneys for the Society of Actuaries and the American Academy of Actuaries

Of Counsel:

SHEA & GARDNER
734 15th Street, N.W.
Washington, D.C. 20005

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
Interest of the amici curiae	1
Introduction and summary	4
Argument	7
I. The pooling and classification of risks	7
II. Classification on the basis of sex in the administration of retirement programs and the effects of prohibiting this practice	12
A. Defined benefit plans	12
1. Non-contributory plans	12
2. Contributory plans	18
3. Insurance contract plans	19
B. Defined contribution plans	23
C. Target benefit plans	26
III. The intent of Congress	27
Conclusion	30
Appendices:	
A. Principal types and features of retirement plans	A-1
B. Female and male longevity	B-1

TABLE OF AUTHORITIES

Cases: Page

Helvering v. *Le Gierse*, 312 U.S. 531 (1941) 7
Rosen v. *Public Service Electric and Gas Co.*, 328 F. Supp. 454 (D.N.J. 1970), *on remand from* 409 F.2d 775 (3d Cir. 1969) 16

Statutory Provisions:

Civil Rights Act of 1964, Title VII, Pub. L. 88-352, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 42 U.S.C. § 2000e *et seq.* (1970 ed. and Supp. V 1975) ..... *passim*
Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829:
§ 204(b)(1)(F), 29 U.S.C. § 1054(b)(1)(F) (Supp. V 1975) 28
§ 204(c), 29 U.S.C. § 1054(c) (Supp. V 1975) 29
§ 204(c)(2)(b)(ii), 29 U.S.C. § 1054(c)(2)(b)(ii) (Supp. V 1975) 29
§ 301(b), 29 U.S.C. § 1081(b) (Supp. V 1975) 19, 28
INT. REV. CODE OF 1954, § 401 (1970 & Supp. V 1975), as amended, 26 U.S.C.A. § 401 (1977 Supp.) A-1
D.C. CODE ANN. § 35-715 (1973) 11
IOWA CODE § 507B.4.7(a), (b) (1975) 11
MD. ANN. CODE art. 48A, § 223(a) (1972) 11
VA. CODE ANN. § 38.1-52 (1977 Supp.) 11

Treatises and Articles:

AMERICAN COUNCIL OF LIFE INSURANCE, PENSION FACTS 1976 5
AMERICAN COUNCIL OF LIFE INSURANCE, PENSION FACTS 1977 ..... 4, 5
A. SCHEINFELD, YOUR HEREDITY AND ENVIRONMENT (1965) B-2
Bailey, Hutchison & Narber, *The Regulatory Challenge to Life Insurance Classification*, 25 DRAKE L. REV. 779 (1976) 11

TABLE OF AUTHORITIES—Continued

Page

Bayo, *Mortality of the Aged*, 24 TRANSACTIONS, SOCIETY OF ACTUARIES, Pt. 1 (1972) B-1
Bayo & McKay, *U.S. Population Projections for OASDHI Cost Estimates*, ACTUARIAL STUDY No. 72 (U.S. Department of Health, Education and Welfare, Social Security Adm., Ofc. of the Actuary, July 1974) B-4
Cherry, *The 1971 Individual Annuity Mortality Table*, 23 TRANSACTIONS, SOCIETY OF ACTUARIES, Pt. 1 at 475 (1972) B-2
Fellers & Jackson, *Non-Insured Pensioner Mortality, The UP-1984 Table*, 25 PROCEEDINGS, CONFERENCE OF ACTUARIES IN PUBLIC PRACTICE 456 (1976) B-3
"Fewer Heart Disease Deaths," Wall St. J., July 26, 1977, at 1, col. 3 ..... B-4
Greenlee & Keh, *The 1971 Group Annuity Mortality Table*, 23 TRANSACTIONS, SOCIETY OF ACTUARIES, Pt. 1 at 569 (1971) B-1, 2
Jenkins & Law, *A New Mortality Basis for Annuities*, 1 TRANSACTIONS, SOCIETY OF ACTUARIES 369 (1949) B-2
Lautzenheiser, *Sex and the Single Table: Equal Monthly Retirement Income for the Sexes?*, 2 EMPLOYEE BENEFITS JOURNAL, No. 1 (Fall 1976) B-4
M'Clintock, *Special Tables for the Estimation of Mortality Among Annuitants*, 6 TRANSACTIONS OF THE ACTUARIAL SOCIETY OF AMERICA 13 (1900) B-1
Metropolitan Life Insurance Co., *Reduction in Perinatal Mortality*, 43 STATISTICAL BULLETIN 6 (May 1962) B-4
Metropolitan Life Insurance Co., *Sex Differentials in Mortality Widening*, 52 STATISTICAL BULLETIN 2 (Dec. 1971) B-3
Metropolitan Life Insurance Co., *Sex Differentials in Mortality*, 55 STATISTICAL BULLETIN 2 (Aug. 1974) B-3, 4

TABLE OF AUTHORITIES—Continued

	Page
Metropolitan Life Insurance Co., *Expectation of Life Among Nonwhites*, 58 STATISTICAL BULLETIN 5 (March 1977)	12
Metropolitan Life Insurance Co., *Longevity in the United States at New High*, 58 STATISTICAL BULLETIN 9 (May 1977)	12
Mortality Differentials by Sex, TRANSACTIONS, SOCIETY OF ACTUARIES, 1973 REPORTS 225 (1974)	B-3, 4
N. KEYFITZ & W. FLIEGER, WORLD POPULATION: AN ANALYSIS OF VITAL DATA (1968)	B-1
Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B.U. L. Rev. 624 (1973)	B-4
P. SHEPHERD & A. WEBSTER, SELECTION OF RISKS (1957)	11
Peterson, *Group Annuity Mortality Table*, 4 TRANSACTIONS, SOCIETY OF ACTUARIES 246 (1952)	B-1
Report of the Committee on Group Annuities, Group Annuity Mortality, in TRANSACTIONS, SOCIETY OF ACTUARIES, 1975 REPORTS 287 (1976)	B-1
R. MITCHELL, FROM ACTUARIUS TO ACTUARY (1974)	10
S. HUEBNER & K. BLACK, LIFE INSURANCE (8th ed. 1972)	11
UNITED NATIONS, DEMOGRAPHIC YEARBOOK (23d ed. 1971)	B-1
U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, NATIONAL CENTER FOR HEALTH STATISTICS, VITAL STATISTICS OF THE U.S. 1971, Vol. II, Pt. A (1975)	11, 12, B-1

Miscellaneous:

EEOC Decision No. 72-1919, June 6, 1972, CCH EEOC DECISIONS (1973) ¶ 6370	16
Rev. Rul. 76-47, 1976-1 INT. REV. BULL. at 109	29
Rule 42(2), Federal Rules of Civil Procedure	1
41 Fed. Reg. 48484 (1976)	28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES ET AL.,
Petitioners,

v.

MARIE MANHART ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE SOCIETY OF ACTUARIES AND THE AMERICAN ACADEMY OF ACTUARIES AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE [1]

This brief is submitted by two professional actuarial organizations, the Society of Actuaries and the American Academy of Actuaries.

---

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 42(2).

The Society of Actuaries was formed in 1949 by a merger of the Actuarial Society of America (founded in 1889) and the American Institute of Actuaries (founded in 1909). Members are either Associates or Fellows. To become an Associate of the Society, it is necessary to pass a series of five examinations, except where a waiver is granted for distinguished foreign actuaries. Admission as a Fellow of the Society requires passing four additional examinations.

These examinations are given by the Society and cover a broad range of topics involving actuarial considerations. In addition to general actuarial theory, the examinations cover a number of applications of actuarial theory, including extensive training in employee retirement plans. Passage of these examinations is widely recognized as denoting high professional stature as an actuary.

The American Academy of Actuaries was formed in 1965 as a national accrediting organization by the four existing national actuarial organizations—Casualty Actuarial Society, Conference of Actuaries in Public Practice, Fraternal Actuarial Association, and Society of Actuaries (the "constituent organizations"). The Academy and its constituent organizations, or their predecessors, have represented the actuarial profession in the United States for nearly 90 years.

The accreditation role of the Academy fills a void, since the states do not license actuaries in a fashion similar to most other professions. The Academy membership today encompasses qualified actuaries in all areas of specialization and practice within the profession. Entry into the Academy involves both education and experience requirements. Over 90% of those actuaries in the United States who have satisfied the entrance requirements of the Academy have become members.

There are currently over 7,000 members of the Academy and the four constituent organizations. These actuaries

are employed by independent consulting actuarial firms, insurance companies, governmental departments and agencies, and institutions of higher learning in academic roles. In recent years actuaries have also been employed by accounting firms, management consulting firms, industrial corporations and labor unions.

The actuarial profession, as one of its major and most significant activities, plays a central and necessary role in the design and administration of employee retirement plans. In that connection actuaries perform computations and make recommendations without which these plans could not be sensibly and effectively administered. In many cases these computations and recommendations take into account the sex of the employees that participate in or are covered by the retirement plans. Our work has made us familiar with the day-to-day operation of retirement programs. The work requires special training and experience and an understanding of a branch of mathematics—the theory of probabilities—without which anyone treating with averages and the classification of risks can fall rather easily into serious error.

We believe, accordingly, that we are in the unique position of being able to offer the Court information that will supply a contextual background that should be helpful in its consideration of this case. We shall, for the most part, leave to the parties and the other amici discussion and analysis of the legal materials that bear upon the proper interpretation in this context of the prohibition in Title VII of the Civil Rights Act of 1964 of discrimination against any individual "with respect to his compensation, terms, conditions or privileges of employment because of such individual's . . . sex . . . ." Actuaries have no special expertise to offer in this regard. We can, however, help to inform the Court about the extent to which the sex of covered employees is and will continue to be taken into account in the administration

of retirement plans, about the manner and extent to which present practices might have to be changed if all or some sex classification were prohibited in connection with the fixing of contribution rates and benefit levels, what the principal effects of requiring such changes would be, and in general what the impact of the Court's decision might be in an area that affects hundreds of thousands of employers and many millions of employees. We shall, in the course of that discussion, try to expose as fully as possible the premises that have been accepted by actuaries and which are in substantial part the bases for the opinions and recommendations that they have offered to plan sponsors and to insurance companies in the past.

We note at the outset that from the narrow viewpoint of the economic self-interest of the members of the actuarial profession there is no reason for us to support either affirmance or reversal of the judgment below. We believe we have the obligation to bring to the attention of the Court data acquired by us in the course of our work and to explain the principles and concepts that we employ in that connection.

INTRODUCTION AND SUMMARY

In 1976 over 40 million Americans were participants in some form of non-governmental retirement plan, of which there were about 500,000 then in effect. Putting aside the persons entitled to benefits under the Old Age Survivors and Disability Insurance Program (Social Security), there were, in addition, another 15 million persons covered under retirement plans administered by federal, state and local governments. During 1976, approximately $48 billion was set aside for the payment of future benefits, and at the end of that year approximately $413 billion was held for that purpose.[2]

[2] AMERICAN COUNCIL OF LIFE INSURANCE, PENSION FACTS 1977, 21, 30, 39-40, 41, 43 (1977) (publication of this booklet is due in late 1977 or early 1978; the figures are from a preliminary draft made available by the Council). Corresponding figures for the end of 1975 are at *id.*, PENSION FACTS 1976, 17, 19, 21, 26-27, 29, 31 (1976).

Retirement plans can be broadly divided into different categories in several different ways according to: (1) whether the plan is drawn primarily in terms of the benefits that will be payable to employees upon retirement ("defined benefit plans") or in terms of the contributions that are made to provide those benefits ("defined contribution plans"); (2) whether contributions are made only by the employer ("non-contributory plans") or by the employer and the employees ("contributory plans"); (3) whether the benefits are provided by an insurance company which accumulates and invests the contributions and in certain circumstances also assumes the legal obligation to pay the benefits ("insured plans") or by a trustee that performs the same functions but without assuming such an obligation ("trusteed plans" or "non-insured plans"); and (4) by the form in which the benefits will be paid, as, for example, annuities (monthly amounts for life, or for a stated number of years), or in a lump sum, or in some other manner. Thus, there could be a non-contributory defined benefit insured plan which provides for an election between a monthly payment for life or a lump sum.

Under defined benefit plans the central objective is the payment of a pre-determined annual benefit for each employee reaching normal retirement age, which amount will be payable for the life of the retiring employee. The amount of the annual benefit, with exceptions not relevant here, is the same for a female employee as it is for a male with a comparable earnings and service record. Under defined contribution plans, a specified amount of money is set aside for each employee, whether male or female, and such amounts are accumulated until normal

retirement age. At normal retirement age, the employee is often given the option of receiving the accumulation in a lump sum or having it used to purchase a life annuity.[3]

Women, as a class, live longer than men, as a class. A group made up of a reasonably large number of women will survive for a greater number of years than will an equal number of men, if all other factors that affect longevity, primarily age distribution and health, are identical. The difference is substantial.[4]

As a consequence, if a lifetime pension in the same monthly or annual amount is to be provided for an equal number of men and women of the same ages, a larger amount will have to be expended to pay the pensions to the women than to pay the pensions to the men. Also as a consequence, if an amount of money is to be completely liquidated by the payment of lifetime pensions to a number of women, the annual amount that can be paid to each will be less than can be paid to each of an equal number of men of identical ages in order to completely liquidate an identical initial amount of money. These inexorable facts of life, death and arithmetic, which cannot be changed by any Act of Congress or judgment of this Court, give rise to the narrow issue presented in this case as well as to a number of other analogous issues which may well be affected by the decision.

---

[3] A more detailed summary of the principal types and features of retirement plans is set forth in Appendix A.

[4] A discussion of the difference in longevity between men and women and of the probable reasons therefor is set forth in Appendix B.

ARGUMENT

I. The Pooling and Classification of Risks

A fundamental question in this case involves the determination of when individuals may be treated as members of a class to which they belong (and which classes are permissible and which impermissible) and when they must be treated solely as individuals. Since the business of providing and guaranteeing retirement annuities and insurance necessarily involves the pooling and classification of persons and risks, some discussion of why this is so and how it is done is appropriate before we turn to how and why classification on the basis of sex is employed in the administration of pension plans.

As this Court noted in *Helvering* v. *Le Gierse*, 312 U.S. 531, 539 (1941), persons who purchase life insurance seek "to shift and distribute risk of loss from premature death." The risk of loss referred to was that the funds accumulated to meet the needs of dependents would be insufficient if early death occurred. Those who provide annuities seek to shift and distribute the risk that the annuitants will live on unexpectedly for a long time and thereby exhaust the amounts set aside for their retirement years. The actuarial principles and the methods that are employed in those instances are the same as they are in providing insurance against other risks, and may be illustrated by a hypothetical example.

Suppose 10,000 individuals of varying ages have each accumulated $100,000 savings which they wish to use (together with the earnings on the diminishing amounts) to provide level monthly amounts with which to meet their living expenses and which will continue as long as they live. Since no one of them can know how long he or she will live, no one of them can decide how much can prudently be used each month. If all are willing to pool their savings and to receive a level monthly amount that will cease upon their deaths, whether early or late, this

uncertainty can be eliminated. Although it cannot be known at the outset how long any one person will live, the accumulation and analysis of a large body of data permit a very accurate prediction about the rate at which the entire class will die in the future. From this it can be readily determined what periodic installment payments may be made to each of them so that the initial amount of one billion dollars (and the earnings thereon as it is liquidated) will be used up at approximately the time when the last payment is made to the last survivor. Thus the uncertainty faced by each individual can, to a high degree of accuracy, be largely eliminated for the entire group without risk of loss, by pooling the risks and dealing with classes of persons rather than individuals.

Before turning to the question of whether and why the group should be divided into smaller classes when determining the amount that each individual should receive, it should be noted that if it were decided at the outset that all persons in the group should receive exactly the same periodic amount, it is readily determinable, on the basis of the predicted longevity of the persons in the group, what that amount should be. To determine the longevity of the group the characteristics that affect its longevity must be known. If the determination were to be made without taking the ages of the members of the group into account, the result would be grossly inaccurate, if the computation could be made at all, since some guess about the age distribution of the persons in the group would be necessary, and the result would depend significantly upon the accuracy of the guess. This is because any reasonably large number of persons of a given age will, as a group, survive for more years than will an equal number of persons who are, say, ten years older. Similarly, if the determination of the amount to be paid were made without reference to the sexes of the individuals in the group, the result would be seriously and unacceptably erroneous. This is because a large number of women will

survive for a total number of years that is greater than the total number of years that the same number of men of the same ages will survive.

It has been almost universally accepted, however, without serious dispute, that in any arrangement of this kind each person should receive an amount that, within the limits of administrative feasibility, is equal to a proportionate share of the amount that will be paid to the identifiable sub-class of persons to which he or she belongs, the class which most nearly reflects his or her mortality. The validity of this principle that each member of the group should be charged in proportion to the risk that he or she contributes to the pool of risks may be defended on either or both of two related grounds.

The first is that, when annuity arrangements of this kind are sold by a business, then, without reaching the question whether this principle is "fair" or "equitable," it is essential to the successful operation of the business that persons who transfer higher risks to the group than others should be charged more. A well known practice or phenomenon, of great significance to the annuity and insurance business, is known as "adverse selection." It has been the experience of the industry that, if a particular form of benefit is made available to the market at a price that is materially lower than its actual cost, that product will be bought in substantial quantities by the public.[5] Correspondingly, a product that is overpriced will tend to disappear.

To take an extreme example, if an insurance company that is currently charging 65-year-old women $10,000 for a lifetime annuity of $65 per month and charging

[5] Although annuity and insurance contracts contain a number of standard provisions required by law, they also vary greatly from company to company and over time. Contractholders are offered a variety of options, and different features are combined in different ways, reflecting the opinions of different companies about the needs and desires of the market. Each of these options must be priced to reflect approximately their respective costs.

55-year-old women $14,000 for the same annuity were to seek to simplify its procedures while obtaining the same revenue by charging both groups $12,000, it would not be long before there was a substantial increase in the number of its young customers and a decrease or the disappearance of its older customers. The result of such a development would be substantial losses.[6] The business simply cannot sensibly be conducted in this fashion. For this reason new products are intensely scrutinized by actuaries to guard against the possibility of adverse selection, and, even so, dramatic examples of the practice continue to occur. It is this principle of adverse selection that explains why age and sex alone have been the significant factors in pricing annuities.[7]

Second, many of the members of our profession also believe that there is a concept of "actuarial equity" that is sound, and that the value judgment can be made that it is "fair" to take into account differences in the risk contributed by an individual or group of individuals whenever there is sufficient statistical experience to make reliable predictions about those differences. They believe that where it is probable that a person or class of persons will receive a larger share of the total benefits to be disbursed, the person or class (or those contributing on their behalf) should contribute a larger share of the

[6] Some 200 years ago in England, merchants and professionals formed insurance societies that exacted assessments independently of age, sex, or other factors, and these societies failed as members aged, died, collected benefits, and thrust the costs onto the prospective young members, who therefore refused to join. R. MITCHELL, FROM ACTUARIUS TO ACTUARY 1, 2 (1974) (booklet published by Society of Actuaries).

[7] Additional factors such as health and occupation are significant in pricing life insurance: if a person knows that he or she is likely to die sooner than the average (say, because of diagnosed disease or a hazardous occupation), then that person is not likely to purchase an annuity. The person "self-selects" out of the pool of participants. In the case of life insurance, however, the prospective purchaser has the opposite motivation; thus the insurance company must take the applicant's health and occupation into account.

amount needed to pay the benefits, even though it is not certain at the outset that they will actually receive a higher amount.[8] "Actuarial equity" thus requires not only that persons with similar risks be treated alike but that persons with dissimilar risks not be treated alike. This view has probably played a large role in many state nondiscrimination laws that prohibit only "unfair" discrimination among persons in different classes.[9]

Two qualifications must be noted. Actuaries recognize that it is not only impossible to quantify the risk contributed by each individual, it is also not necessary to extend the classification process to its ultimate limit. Two classes with observable differences may nonetheless be lumped together and treated as a single class if the relevant differences, though identifiable, are relatively small. The minor "unfairness" may be outweighed by the added expense involved in treating the two cases differently. Moreover, small differences do not give rise to significant adverse selection and so are acceptable. Second, certain classifications which may be perfectly feasible from an actuarial standpoint may be barred by others for reasons of social policy. For example, black persons exhibit shorter longevity than white persons, but they are not charged a lower amount when they purchase annuities or a higher amount when they purchase life insurance.[10]

[8] S. HUEBNER & K. BLACK, LIFE INSURANCE 501 (8th ed. 1972); P. SHEPHERD & A. WEBSTER, SELECTION OF RISKS 1 (1957).

[9] See, *e.g.*, IOWA CODE § 507 B.4.7(a), (b) (1975), MD. ANN. CODE art. 48A, § 223(a) (1972); VA. CODE ANN. § 38-715 (1977 Supp.) *But see* D.C. CODE ANN. § 35-715 (1973) ("unfair" qualification omitted). For citations to the corresponding provisions of all the states, see Bailey, Hutchison, & Narber, *The Regulatory Challenge to Life Insurance Classification*, 25 DRAKE L. REV. 779, 782 n. 17 (1976).

[10] Over the last 40 years the difference in mortality between black and white persons has been narrowing. Moreover, at the higher ages which are of primary concern in retirement plans the differences have become virtually nonexistent. U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, NATIONAL CENTER FOR

If any classification that is actuarially sensible is to be prohibited by law, it must be done by persons responsible for making and interpreting the law. Such a decision will ordinarily be accompanied by an increase in cost or by a change in the manner in which total cost is divided, and ideally the persons responsible for the prohibition should decide how the division of costs should be made.

II. Classification on the Basis of Sex in the Administration of Retirement Programs and the Effects of Prohibiting This Practice

We turn now to the examination of the extent to which sex differences are currently taken into account in the administration of retirement plans and to the types of problems posed if current practices are required to be substantially revised. We believe it would be more helpful to the Court if we treat this subject in an organized way and discuss the specific type of plan that is at issue in the case at bar when it arises naturally in the discussion rather than at the outset. In the discussion that follows, the comparisons assume that the men and women involved are similarly situated, that is, such factors as salary, age, and length of service are identical.

A. *Defined Benefit Plans*

1. *Non-contributory plans.* Most defined benefit plans in effect today are non-contributory, that is, the employer pays the entire cost of the plan. Such plans ordinarily provide for the payment of equal monthly pensions as a single life annuity at retirement, without regard to the sex of the retiring employees. Such a non-contributory defined benefit plan provides a monthly (or other periodic) payment that is identical for both sexes, assuming, as we have said, that all other applicable factors are the same.[11] So far as we know no one has suggested that such a plan discriminates unlawfully or unfairly on the basis of sex. Upon a closer look, however, it becomes evident that the issue is not as simple as might at first blush appear.

Many, and perhaps most, defined benefit plans permit employees to elect to receive their benefits in a different form than in equal installments payable for life. Indeed, ERISA now requires that, unless a married employee elects otherwise, the benefit must take the form of a "joint and survivor annuity" (installments payable so long as either spouse remains alive). The question immediately arises, if for example the "normal" pension is equal to $1,000 per month for a retiring employee regardless of sex, what the monthly payments should be under a joint and survivor annuity, to take into account the fact that the benefits will be paid over a longer period of time. A similar question arises if the plan permits its employees to elect, instead of a joint and survivor annuity, an annuity for the period of the employee's life with a minimum payment period of ten years or if the plan permits the benefit to be paid in a lump sum upon retirement.[12]

Employers have great flexibility in deciding what the benefit formulae shall be, and so we cannot describe any current universal practice. (App. A, p. A-1.) In the majority of cases, the ages and sexes of the participants

---

HEALTH STATISTICS, VITAL STATISTICS OF THE U.S. 1971, Vol. II, Pt. A, § 5 at 10 (1975). *See also* Metropolitan Life Insurance Co., *Longevity in the United States at New High*, 58 STATISTICAL BULL. 9 (May 1977); *id.*, *Expectation of Life Among Nonwhites*, 58 STATISTICAL BULL. 5 (March 1977).

[11] In practice, the employer's cost as a percentage of pay may be higher or lower for the class of female employees, than for the class of male employees, depending upon the number of persons in each class and upon differences in mortality rates, disability rates, withdrawal rates, rates of salary increase, average retirement age and other factors.

[12] Only a minority of defined benefit plans permit a lump sum to be elected but there is no legal restriction against such a provision.

and spouses have been taken into account. Under a typical trusteed plan, for example, where a 65-year-old man who retires with a wife who is also 65 years old chooses a 50% joint and survivor annuity (payments to a spouse who survives the employee will be one-half of the initial installment payments), the monthly benefit is reduced from $1,000 to take account of the fact that the benefit may be paid over a longer number of years. The $1,000 per month might be reduced to $870 per month. If the retiring employee is a woman and her husband is 65 years old and she makes the same election, her $1,000 monthly pension might be reduced to $940 for a monthly difference of $70. The $70 difference reflects the fact that the beneficiaries added in each case have different life expectancies. The female employee has less reduction because there is less chance that her husband would collect payments after her death than there is in the case of a male employee with a wife age 65. The pensions are thus kept equal in cost, and, although the monthly amounts of pension differ, their values are equal if the length of time during which they are expected to be paid is taken into account.

If the two employees choose instead a lifetime annuity with payments to be made for no less than ten years ("ten years certain"), then the installment payments may be reduced to $910 for the retiring male employee and $960 for the retiring female. Finally, if a lump sum is chosen by each of them under a plan that allows such lump sum distributions, the man will receive $111,000 and the woman $130,000. Thus, women would receive a significantly larger payment after completing the same work tour as men.

The principle that is followed in determining the foregoing amounts is that the amount to be received by a retiring employee and the employee's beneficiaries, regardless of the form in which the benefits are taken, should,

under assumptions of mortality and interest rates, be the actuarial equivalent of the "normal" or "primary" benefit. In more functional terms the amount of the benefit is determined so that, if the actual interest rate and the actual mortality of the employees are the same as that anticipated at the time of retirement, the cost of the benefit to the employer will be the same, regardless of the form in which the employee elects to receive the benefit.

Some plans determine the amount of joint and survivor benefits by the application of factors which do not take sex into account. Some plans have done so in order to reduce employee dissatisfaction which occurs because employees do not understand the reason for differing actuarial factors. In the joint and survivor example given above, instead of a payment of $870 for male employees and $940 for female employees, such an employer might shift to $900 regardless of sex. This would result in a reduction in cost for the employer to the extent that female employees elect the joint and survivor annuity. On the other hand, the plan would have an increased cost for male employees who make such an election. Some plans also do not take the sex of the retiree into account when converting a lifetime annuity into an annuity with ten years certain, although many do so. We know of no plans which do not take sex into account if lump sum payments are to be made.

The use of factors that do not take sex into account has been possible only in a plan where the gain or loss is borne by the employer. As is explained more fully below, under certain insured plans where the obligation to pay the benefit has by contract been assumed by an insurance company, the contracts in current use require the use of conversion factors that include sex as a factor, and it would not currently be possible for an employer to

shift to unisex tables in determining joint and survivor benefits.

Another very commonly found provision permits the early or deferred retirement by an employee. Some plans provide for no change in the pension if such an election is made, and some plans provide for a change in the benefit by the application of retirement factors that do not take sex into consideration.[13] Other pension plans include early retirement factors which do reflect the separate mortality experience of males and females, and these provide a lesser reduction for women than for men.[14] Here again this is obligatory under certain kinds of insured plans.

Since there are many plans already in existence which do not provide for a reduction which differs by sex, it obviously would not be impossible for most plans to comply with a requirement that early retirement factors be independent of sex. Depending on the revised early retirement factors adopted and the extent to which early retirement is elected by persons of different sex, the change might increase or decrease the cost to employers. Some employers might choose to offset any such change by making approximately corresponding changes in other features of the plan. A similar analysis can be made of provisions that prescribe how the amount of a pension will change in the event of deferred retirement.

---

[13] In at least one case it has been held that a plan that provides a reduction for men in the case of early retirement and for a lesser reduction for women for reasons unrelated to differences in longevity violates Title VII. *Rosen* v. *Public Service Electric and Gas Co.*, 328 F. Supp. 454 (D.N.J. 1970), *on remand from* 409 F.2d 775 (3d Cir. 1969).

[14] The EEOC has held that such a plan provision violates Title VII. EEOC Decision No. 72-1919, June 6, 1972, CCH EEOC DECISIONS (1973) ¶ 6370. We suggest respectfully that, while the decision may or may not be correct, the opinion does not reflect an appreciation of what we regard as the genuine difficulty of the issue that was presented.

What would be the result if it were to be held that Title VII or some other Act of Congress requires that all benefits, in whatever form elected, must be numerically identical rather than actuarially equivalent for employees of different sexes who are otherwise similarly situated? Such a requirement might be met in a variety of ways. To simplify the discussion, we shall change the above example to a plan with only the alternatives of a monthly lifetime pension and a lump sum. The employer might agree to pay all male employees who elect a lump sum $130,000 instead of $111,000. This, of course, would increase the cost to the employer and some employers might not be willing to assume this additional cost. There is no legal requirement concerning the overall level of benefits that must be provided, and some plans are far more generous than others. Accordingly, some employers might decide instead to reduce the lump sum payable to retiring female employees who elect that benefit to $111,000. That would reduce the employer's cost, but it would hardly be of any benefit either to male or female employees. It would also raise questions about whether already vested benefits could be "reduced" in this fashion. Finally, the employer might try to keep its costs unchanged, at least prospectively, by providing that a pension benefit of $1,000 per month could be converted, for both male and female employees, into a lump sum of $120,000. The difficulty with this solution is that, if it were adopted, male employees who were well advised and who actually desired a lifetime pension might be able to elect a lump sum benefit, buy an annuity of $1,000 per month from an insurance company for less than $120,000 and pocket the difference. This would raise anew the question of whether equality between male and female employees had in fact been achieved. The added benefit provided to male employees in this illustration would come partly from the employer and partly from

those women employees who had uneconomically elected a lump-sum benefit.

Another solution, and one that many expect would be the result, would be the determination by some employers to eliminate certain options, particularly the lump sum distribution option. This would be disadvantageous to the class of both women and men who might find the lump sum option attractive for such reasons as major illness.

2. *Contributory plans.* Most defined benefit plans are noncontributory, but a substantial minority requires employee contributions. Employee contributions are almost always—unlike the plan in the case at bar—unrelated to age or sex. To the extent that employee contributions are related to age or sex, they are found in plans adopted by governmental bodies and not by private institutions.[15] Under most contributory plans the employer's aggregate contributions will be substantially greater than the aggregate contributions made by employees.

Since defined benefit plans which provide for different contribution rates for male and female employees are exceedingly rare, there would not be a widespread effect if equal employee contribution rates were to be required in the case at bar. Significant problems would arise, however, if the sex of the employees could not be taken into account in determining amounts of benefits or amounts of employer contributions in contexts that have already been described and in others yet to be described. In particular, a determination that the amount of employee benefits in any form must be identical for both sexes would have a dramatic impact.

It should be made clear that whatever decision may be made concerning the permissibility of taking sex into

[15] Note 18, *infra*, provides a possible explanation for the origin of this type of plan.

account in fixing the contributions or the benefits under a defined benefit plan, actuaries must be able to continue to take the sex of employees into account in connection with their determination of what probable costs must be borne by the employers under such plans.[16] The actual cost, of course, will be determined by what is in fact paid, the expenses of administration, and the earnings rate. The job of the actuary is to help the employer make an accurate estimate of how much should be contributed annually, without imposing an excessive strain in any given year, in order to produce an amount sufcient to pay all of the promised benefits. In determining what contributions should be made, the actuary must take account of the expected experience concerning mortality, disability, turnover, salary increases and other factors which studies have shown differ by sex. If the actuary does not do so, the determinations will be less accurate, and we can hardly believe that any provision of law requiring non-discrimination among persons will be interpreted to prohibit an employer that would like to have as accurate information as possible from obtaining it from a person who is able to provide it.

3. *Insurance contract plans.* Some plans are funded exclusively with individual insurance and annuity contracts with level annual premiums. If such plans meet the requirements of Section 301(b) of the Employee Retirement Income Security Act of 1974 ("ERISA"),[17] they are known as "insurance contract plans." For insurance contract plans and certain other insured plans,

[16] Since defined benefit plans provide primarily for the benefits that will be payable, it is not necessary, as it is under a defined contribution plan, to establish individual accounts or to make contributions for individual employees, so that the question of whether equal contributions are being made for male and female employees, while an appropriate one to ask, does not have as evident an answer.

[17] Pub. L. 93-406, 88 Stat. 829, 29 U.S.C. § 1081(b) (Supp. V 1975).

any general requirement that contributions must always be equal or that benefits for persons of different sexes must be identical rather than actuarilly equivalent would create far more difficult problems than those generally faced by other plans. To the extent that only some of the existing practices are invalidated and others found to be acceptable, the difficulties, of course, would be correspondingly reduced.

The reason for the greater difficulty arises from the fact that under insurance contract plans and some other insured plans the obligation to pay pension benefits has been transferred from the employer or the plan to the insurance company, and the insurance company's contractual obligations run directly to the individual employees. Those contractual obligations are normally cast in terms that provide for actuarial equivalence, if an employee elects to change the form of the benefits. If only numerically equal payments are to be deemed to be satisfactory, that is, if males and females must be entitled to the same monthly or other periodic payment, or alternatively to the same lump-sum payment, and if such a decision is made retroactive, the result—in our carefully and thoroughly considered opinion—would be chaotic, if not impossible, under these insured plans. The revision and adjustment of the existing relationships involving millions of persons would be a monumental and very probably impossible task. Even if a decision of this kind were expressly given only prospective effect, compliance by insurance contract plans would still present exceedingly difficult problems. The terms of the sale of annuity contracts and insurance policies by life insurance companies have not been directly or indirectly subject to Title VII of the Civil Rights Act of 1964, and, since an essential aspect of the insurance business involves setting charges at levels that are accurately related to the nature and extent of the risks involved, any ruling that creates

disparities between the amount and the cost of certain benefits would necessarily result in the most serious problems for insurance contract plans. We would not even attempt to predict, at this time, what the response of the industry would be to such a decision.

It has been widely suggested that classification on the basis of sex could satisfactorily be eliminated in future contracts by prohibiting life insurance companies from making different charges for lifetime annuities to men and women despite the longevity differences that the two groups display. This would be accomplished by combining the experience of men and women and constructing a single "unisex" mortality table. Whether this would be an acceptable solution is a matter that is exceedingly complex, and an accurate explanation of the problems that would be created and the manner in which they might be solved would require careful and detailed analysis at least as lengthy as that already set forth in this brief. The problems are related but in many respects are quite different. The question of the extent to which adverse selection would result is one that particularly requires examination and analysis of the actual numbers that are involved. In order to avoid extending unduly the length of this brief, we shall not undertake to discuss any of those problems here. In fact, there is no legislation currently pending to require the adoption of unisex tables by all life insurance companies. If such a requirement were imposed upon some but not all insurers, the competitive impact would be most severe. In the circumstances it seems advisable to deal with the situation as it exists today and not to treat with problems that might arise if hypothetical changes were to be made in federal or state law.

It is important to note, however, that in some respects the purchase of insurance or annuities offers greater advantages to employers that have relatively few em-

ployees than to large employers, although some of the country's largest corporations have adopted insured funding for a variety of reasons. The probability that the mortality experience of a relatively small group of persons will diverge from what is anticipated is very much greater than it is for a large group of persons. For a smaller pension plan the purchase of annuities for retired members may provide greater assurance that the promised pensions will actually be paid, no matter how long the pensioners live. The burden of any major change resulting from the prohibition of risk classification by sex is thus more likely to fall more heavily upon smaller employers than upon larger employers. Many small employers currently use insured rather than trusteed plans.

In some respects a given pension plan may present a greater appearance of unwarranted discrimination if it is an insurance contract plan. A trusteed non-contributory defined benefit plan that provides only equal pension benefits will require, as we have pointed out, a determination of the amounts that must be contributed annually to provide proper funding. These amounts are not allocated to any particular employees; all that is readily observable is the total amount contributed each year. If the plan were one established by an employer with relatively few employees it might be funded by the purchase, for each employee, of individual retirement income or annuity contracts. The aggregate contribution might be about the same as under the trusteed plan but it would be made up of contributions under separate contracts, the amount of which would be larger for female employees than for identically situated male employees. Thus it would be easier to raise the question of compliance with Title VII because the employer seems plainly to be making larger aggregate pay-

ments for salary and pension benefits for female employees than for identically situated male employees.[18]

B. *Defined Contribution Plans*

It is extraordinarily rare for a defined contribution plan (except for the target benefit plans discussed at Part C) to provide that different contributions will be made for male and female employees who are otherwise similarly situated. And, since these plans do provide that separate contributions shall be made for each employee which will be accumulated and used to provide the benefits for that particular employee upon his or her retirement, the issue of discrimination on the basis of sex would not seem even to arise. Indeed it does not arise for a plan that provides benefits only in the form of a lump sum or in the form of installments over a stated period of years. Under such a plan there is no pooling of risks. This is true whether the plan is insured or non-insured, and in either case there is no necessity for classification on the basis of sex. Where, however, the plan does provide for a form of benefit that involves life contingencies, the issue arises. This would occur if a lifetime annuity were to be offered as an alternative to, or instead of, the payment of benefits in a lump sum.

Providing the option of life annuity payments plays an important role in meeting the needs for an adequate

---

[18] It may be of interest to know how plans of the type in the case at bar came to be adopted. When state and local governments first began to adopt retirement plans for their employees, it was quite common for a decision to be reached that they should be provided for by equal contributions by the employer and the employee. Since the cost of funding pensions for female employees who remained to normal retirement was higher than for similarly situated male employees, and since half the amount was paid by the employee and half by the employer, higher contributions were required for female employees. This practice has become less common over time and is now quite rare.

retirement income for employees. If the individual retiree receives his or her account balance as a lump-sum payment, the retiree may spend it all before death and spend his or her final years in poverty. Similarly, if the retiree elects installments for a fixed period of years, even if that period equals the life expectancy, the retiree may outlive the payments and have no income in later years. Guaranteeing payments for life, or as long as either the retiree or spouse lives under a joint and survivor annuity, provides an important social role in meeting the needs of retired people.

If it were not allowable to apply the account balance to purchase annuities unless identical monthly benefits were paid to both males and females, employers that had adopted insurance contract plans could not supply the annuities. Their only currently available alternative would be to eliminate entirely the option to obtain life annuity payments and require all participants to take their distribution in a lump-sum payment or in installments not guaranteed to last for life.

Some defined contribution plans do not allow payment of the account balance as a lump-sum payment, but require that it be applied instead to provide only for a lifetime income or for a choice among several types of annuities, each involving life contingencies. The latter type of plan is not common, but it is used by many colleges and universities and by many non-profit health and welfare agencies. Under a defined contribution plan the value of the plan benefit is equal to whatever dollar amount is credited to the employee's account on the date of retirement. In a plan that provides only for annuity benefits, the question is how that value is to be lawfully converted into installment lifetime payments of the "correct" amount, in order to comply with Title VII of the Civil Rights Act of 1964.

Since every insurance company offers to provide annuities in amounts that are different for men and women if an identical single purchase payment is made, the issue arises whether the use of two identical account balances to provide unequal installment payments for men and women constitutes an unacceptable discrimination on the basis of sex. If it were to be held that, under Title VII, a plan may lawfully provide for an election between identical lump-sum benefits for men and women and monthly installment payments for life that are higher for men than for women, then, in our view, it would be thoroughly inconsistent to hold that a plan that provides only the differing monthly lifetime benefits violates the Act. The cost and the value of the benefits provided by both plans are the same. If both types of plan were held to violate the Act, this could only mean that plans of this kind would simply have to be abandoned, with the probable result that employees, male and female, who would otherwise be covered by such plans would have to look elsewhere for their retirement incomes.

Some plans provide for part of the equal contributions made for men and women to be used for the purchase of life insurance. (App. A, p. A-5.) Virtually all major insurance companies charge lower life insurance premiums for females than for males. If a male employee and a female employee for whom the same annual contribution is being made each chooses to have an identical portion of that contribution used for the purchase of life insurance, the female employee will be provided with a larger face amount of insurance. If she survives to retirement, the insurance policy will probably have a larger cash surrender value than the policy purchased for the man, while the rest of their accounts will be identical. Thus, the female employee will receive a higher benefit than a male employee if both elect a lump sum, although the man will still be given higher monthly lifetime payments if this form is elected. Similarly, if the two employees should

each choose to have an identical amount of life insurance purchased for them, the woman would probably receive a larger total lump sum benefit upon retirement.

The question in either case is whether this would constitute a violation of Title VII and, if so, whether it discriminates unfairly against men or against women. The only method for an employer to eliminate such differences by sex would be to provide only a lump-sum benefit or to find an insurance company which uses the same premiums for both sexes. This would probably reduce the benefits available for females without increasing the benefits for males, a result contrary to the interests of participants.

The problems that might arise under a contributory defined contribution plan in this connection are the same as those problems that arise under a non-contributory plan.

C. *Target Benefit Plans*

There are retirement plans which have some aspects of a defined benefit and some aspects of a defined contribution plan, the principal one of which is known as a target benefit plan. (App. A, p. A-5.) These plans have as a goal a specified defined benefit and employ actuarial computations to determine what the contribution should be to provide that benefit. On the other hand, as is the case with defined contribution plans, individual accounts are established which are then used for each employee to provide benefits which may or may not be approximately equal to the original objective. Some target benefit plans take the sex of employees into account in determining the contribution levels and others do not. Inevitably, those plans which take sex differences into account result in higher employer contributions for the class of female employees than for the class of male employees to the extent other factors are equal, and the

lump-sum payment available at retirement is therefore higher for females than for males, although if an annuity is purchased the amount of the installment payments might be more or less for females than for males.

On the other hand, if sex differences are not taken into account in determining the contribution levels, then the contributions are equal for both sexes, the lump-sum amount available upon retirement is identical, and the target benefit will necessarily not be reached in both cases since the monthly installment payment that can be provided with the identical balances will be lower for women than for men. Here again the question arises whether one or the other of these approaches is required by the provisions of Title VII and, if so, which one it is.

III. The Intent of Congress

We stated earlier that we would leave to others the conventional analysis of the legal materials that may bear upon the decision of this case. Here we depart slightly from that commitment to refer briefly to one action of the Congress that occurred well after the enactment of the Civil Rights Act of 1964.

So far as the views of the Congress which adopted the 1964 Act are concerned, we think it reasonably clear that neither the members of that Congress nor the members of the committee that drafted and considered the legislation ever focused in any meaningful way upon what was meant by the meaning of the term "discrimination" in this intricate context. There does not seem to have been even scant consideration, when that Act was adopted, of the extent and the manner in which classification on the basis of sex had been previously employed in connection with the determination of contributions and benefit levels for employee retirement plans and to what extent, if any, then current practices might have to be modified as the result of passage of the Act.

Ten years later, in the Employee Retirement Income Security Act of 1974, Congress established minimum amounts that must be paid to participants under defined benefit plans who terminate their employment prior to retirement. The terminology employed speaks of the "accrued" benefit which the employee must receive. Section 204(b)(1)(F) states that, if a plan is funded exclusively by the purchase of insurance contracts which satisfy the requirements of § 301(b)(2) and (3) of the Act, the requirement for a minimum payment will be satisfied by the payment to the employee of the cash surrender value of the insurance contract. In this instance the members of the committee that drafted and considered the legislation were quite knowledgeable about the subject matter and did understand that the type of contract described in § 301 of the Act would provide cash surrender values for female employees that were higher than the corresponding values provided for male employees with identical employment histories, although we must point out that we know of no statement in the legislative history that reflects this understanding. One may speculate over whether the persons involved gave any thought at the time to the consistency of what they were then doing with the provisions of Title VII of the Civil Rights Act of 1964. There is no doubt, however, that they expressly auhorized the adoption and funding method of a plan that included provisions resulting in the payment of numerically unequal benefits to men and women upon termination of employment.[19]

---

[19] The Pension Benefit Guaranty Corporation, the governmental agency which administers the plan termination insurance program under Title IV of ERISA, has issued regulations containing factors which must be used for allocations of pension plan assets under certain circumstances. These actuarial factors published by the Pension Benefit Guaranty Corporation vary by age and sex and result in more assets being allocated to provide benefits for a female than for a male. 41 Fed. Reg. 48484, 48489-91 (1976).

In a related context, on the other hand, the same statute includes a provision that indicates that the use of a "unisex" table is appropriate in certain circumstances, also related to the amount of accrued benefits under a contributory defined benefit plan. Under such a plan, the monthly benefit payable at retirement is usually unrelated to the amount of employee contributions. Thus a plan might provide for employee contributions of 4% of pay and monthly benefits at age 65 of 1½% of pay times years of service, and there is no need to determine upon retirement what portion of the benefit is regarded as having been derived from employee contributions and what portion is regarded as having been provided by employer contributions.

The portion of the employee's accrued benefits which is derived from his own contributions is always 100% vested, while the portion derived from employer contributions is not usually vested before 10 years of service. If the employee terminates employment before the employer-derived benefit fully vested, ERISA requires the total accrued benefit to be divided into the employee-derived portion and the employer-derived portion.[20] The Act sets forth explicitly how this shall be done and, in determining the employee-derived portion, requires the accumulated employee contributions to be multiplied by an appropriate actuarial conversion factor.[21] The conversion factor in the statute and supplemental factors published by the Internal Revenue Service[22] are unisex factors. A plan is permitted to use sex-differentiated factors if these result in a larger employee-derived benefit,

---

[20] Employee Retirement Income Security Act of 1974, § 204(c), 29 U.S.C. § 1054(c) (Supp. V 1975).

[21] Employee Retirement Income Security Act of 1974, § 204(c)(2)(B)(ii), 29 U.S.C. § 1054(c)(2)(B)(ii) (Supp. V 1975).

[22] Rev. Rule 76-47, 1976-1 INT. REV. BULL. at 109.

and some plans have done so, but most contributory plans have adopted the unisex approach.

CONCLUSION

The foregoing discussion is illustrative rather than exhaustive; it is over-simplified and omits what we hope is only irrelevant detail. We should be glad to amplify it in any way if that should be thought helpful.

We believe that any sweeping decision that only numerical identity is permissible in making contributions and in the payment of benefits would have a deeply disturbing effect upon the current methods of providing retirement benefits and might adversely affect millions of participants. We respectfully suggest that this Court render a decision that will not have widespread and unintended adverse effects.

Respectfully submitted,

LAWRENCE J. LATTO
JOHN PARSONS WHEELER III
734 Fifteenth Street, N.W.
Washington, D.C. 20005
Attorneys for Amici Curiae Society of Actuaries and the American Academy of Actuaries

Of Counsel:

SHEA & GARDNER
734 15th Street, N.W.
Washington, D.C. 20005

November 17, 1977

APPENDICES

APPENDIX A

PRINCIPAL TYPES AND FEATURES OF RETIREMENT PLANS

Until the adoption of the Employee Retirement Income Security Act of 1974, the principal regulation of retirement plans by the federal government arose out of the necessity for such plans to meet the requirements for "qualification" under § 401 of the Internal Revenue Code. Contributions made by an employer are deductible in the year in which made if the plans are "qualified," while the employees are taxed, not in that year but in the year in which their benefits are received. In addition, the earnings on the accumulated contributions are not taxable.

One of the more significant requirements for qualification is that the plan must be non-discriminatory, that is, that the plan may not explicitly by its terms, or in practice, provide more desirable pensions for officers, shareholders, and highly compensated employees than it does for other classes of employees. The regulations adopted to insure that this requirement is met are often quite complex, but prior to ERISA, plan sponsors (employers and joint boards of trustees) had broad flexibility with respect to the design of such retirement plans, more specifically with respect to the nature and amount of benefits to be provided, contribution formulas to be employed, eligibility requirements and vesting provisions, and the inclusion of a wide variety of optional features.[1] Since the effective date of ERISA many more substantive requirements must now be met, but the freedom of the plan sponsor to fashion the terms of the plan still remains very broad. In consequence it is not possible

[1] In many cases, of course, the terms of the plan were the subject of collective bargaining between the employer and union representatives.

within reasonable page limitations to provide a comprehensive or exhaustive account of the great variety of provisions found in retirement plans and of the number and kind of individual variations. With this qualification, however, we can describe the major categories into which such plans can be divided and describe in adequate detail the major features that are relevant to the issues before the Court.[2] There are so many different kinds of plans and so many diverse features, that there are likely always to be exceptions to any unqualified general statements in this area.

A. *Defined Benefit Plans*

A defined benefit plan, as the name implies, promises a benefit that is determinable by the use of a stated formula set forth in the plan. Typical examples might be: (1) an annual pension equal to 2% of the sum of the annual amounts earned in each year of employment; (2) 1¾% of the final year's earnings multiplied by the number of years of employment; (3) 2% of the average earnings during the last five years of employment multiplied by the number of years of employment; and (4) $20 per month for each year of employment without reference to the amount earned. Thus, for these plans, while the exact amount of any person's pension cannot be known until retirement, the manner in which it will be determined is known in advance. Defined benefit plans generally provide the same annual pensions for retiring men and women who retire at the same age with identical employment histories.

An important requirement added by ERISA in 1974 is that a plan which provides for a pension that is payable for the lifetime of the employee must also provide

---

[2] The Bankers Trust Company of New York periodically publishes studies of the retirement plans of large United States corporations which include useful information not available elsewhere.

that for married employees, in the absence of an election by the employee to the contrary, payments must continue until the deaths of both the employee and his or her spouse.

A defined benefit plan may provide that all of the costs of providing the benefits will be borne by the employer, and it may also provide for some part of the cost to be borne by contributions by the employees. A substantial minority of defined benefit plans includes such a requirement. Usually the portion provided by the employees is less than the amount contributed by the employer. Probably the largest plan of this kind is that provided by the federal government for its Civil Service employees. A contributory plan will contain provisions for the return, at a minimum, of the employee's contributions plus interest if his or her employment is terminated before the anticipated retirement age. Usually the benefits payable upon retirement do not depend upon how the funds held by the plan are invested or whether the investment results are good or bad.

Defined benefit plans often provide that the amount of the pension will be offset by all or part of the benefits payable under the Social Security system. For example, the plan might provide that the amount of the pension at age 65 shall be reduced by 50% of the amount of the Social Security benefit. Defined benefit plans may provide, and ordinarily do provide, for elections by the retiring employee with respect to the form in which the benefits shall be paid, *i.e.*, (a) in a monthly amount payable over the lifetime of the employee, (b) in a monthly amount payable over the lifetime of the employee but with a minimum of payments for a 10-year period, (c) in a monthly amount over a stated number of years, or (d) in a lump sum. The plan may provide for earlier retirement than the "normal retirement age" or for deferred retirement. In each case the plan will provide

whether and how the benefits will be affected by these elections and events.

B. *Defined Contribution Plans*

Defined contribution plans focus initially upon the amount of contributions rather than the determination of benefits. They provide for contributions on behalf of each employee. Under some plans of this type, known as money purchase pension plans, the contribution for each employee is defined, often in terms of a stated percentage of annual salary. For other plans of this type, known as profit-sharing plans, the amount of the employer's contribution for each year may be determined by reference to a formula related to profits, or may be entirely at the employer's discretion. This amount is then allocated to each of the employees by a stated formula ordinarily in proportion to annual compensation. Under such a plan, it is quite possible that in some years no contribution at all will be made.

Under a defined contribution plan, individual accounts are kept for each employee during the period while he or she is still working, and an amount is credited annually to each of those individual accounts. The funds are invested and the earnings or the losses serve to increase or decrease the amount in the account. Since the amount in each individual employee's account is used to provide benefits for that employee upon retirement, the investment experience affects quite significantly the amount of the benefits that will be received. Defined contribution plans may or may not provide for employee contributions. In one type of defined contribution plan, the "thrift" or "savings" plan, the amount of the employer's contribution is determined by the amount of the employee's contribution, and each employee may elect whether to participate in the plan at all.

A plan may provide that part of the contributions will be used to purchase life insurance payable to designated beneficiaries if the employee should die prior to retirement and for the use of the cash surrender value under these life insurance policies to supplement the amounts in the employee's account to provide retirement benefits.

As is the case under defined benefit plans, the benefits may be in the form of a lump sum or installment payments over a designated period, or the plan may provide for the purchase of an annuity payable over the lifetime of the employee. Variations in the form of annuities are also often available. The annuity may be purchased at the date of retirement, or through installment payments to an insurance company while the employee is still actively employed. The plan may include provision for early retirement or for withdrawal of all or part of the account prior to retirement but, unlike the case with defined benefit plans, there is no need to provide how the amount of the benefit will vary depending upon what form of benefit is chosen by the employee or the date on which benefits are taken or commenced. The employee will receive benefits equivalent in value to what is credited to his or her account.

C. *Other Types of Plans*

There are some plans that do not fall comfortably into one or the other of these two categories. A target benefit plan is a special type of defined contribution plan. Such a plan employs a formula which establishes a "target benefit" that the employer desires to provide. That might be, for example, 1% of the employee's final year's salary multiplied by the number of years of employment. A computation is then made of the amount of annual contribution needed to provide the target benefit, and these contributions are then made by the employer and employees. Unlike the case under defined benefit plans, how-

ever, these contributions are then allocated to individual accounts for each employee, and the plan is then administered as a defined contribution plan. That is, the amount of the target benefit is not guaranteed by the employer or by the plan, and the employee receives whatever benefit can be provided with the amount in this account. This may be more or less than the target benefit, depending upon whether the rate of actual investment income has been equal to the rate assumed in the determination of the contributions that were made, and upon other factors. Some plans take the sex of the employee into account when determining what annual contributions shall be made, and some do not.

In some industries collective-bargained multi-employer plans have been established that accumulate the contributions of several employers and provide retirement credits to persons who may work for one or more of them over their working lives. These plans also do not fit easily into one or the other of the two major categories, and there is currently pending an active dispute over whether they should be treated for certain purposes as defined benefit or defined contribution plans.

Since 1962, self-employed persons have been able to establish tax favored plans for themselves and their employees, and, for the most part, these plans have been defined contribution plans, although it is quite feasible for a partnership with many partners to adopt a defined benefit plan, and several large law and accounting firms have done so.

A special type of plan known as a tax deferred annuity plan may be established by a public educational institution or by a charitable organization for its employees, and these plans are provided favorable tax treatment similar to that available to qualified plans. The contributions are nominally and sometimes actually made by the employers, but in most cases they are derived from

reductions in salary voluntarily agreed to by the employees. These plans are invariably defined contribution plans.

Finally, since 1974 individuals who are not self-employed but are not covered under employer established retirement plans may establish individual retirement plans of their own, and these are also and necessarily defined contribution plans.

D. *The Funding and Administration of Retirement Plans*

Another important method of categorizing retirement plans, and one which is highly relevant to the issues in this case, relates to how and by whom the plans are administered. All retirement plans may be divided into insured plans or non-insured trusteed plans, although many plans use a combination of these two approaches. Both defined benefit plans and defined contribution plans may be either trusteed or insured. Under a trusteed plan, the employer makes annual contributions to a trustee, which in the overwhelming number of cases is a bank or trust company although this is not required by law. Those amounts are held and invested by the trustee and used to pay the employee benefits provided by the plan.

Under an insured plan, the employer enters into a contract with an insurance company (ordinarily a group annuity contract and sometimes individual insurance or annuity contracts for each employee). The employer pays contributions (also called premiums) to the insurance company which holds and invests the funds and agrees to disburse them for the purpose of paying the promised benefits to the employees in the manner provided by the plan and the contract. In many cases the insurance company will assume a contractual liability directly to the employees, sometimes upon the retirement of each employee and sometimes at an earlier date, to

assume the employer's obligations to pay the plan benefits. If this is done, the relationships that are created are quite different from those under a trusteed plan, where the trustee agrees only to use the funds held in the trust to pay the benefits and does not assume an independent obligation—as an insurance company does under many insured plans—to continue to pay benefits whether the amounts contributed by the employer turn out to be more or less than required for that purpose.

An employer that has adopted a trusteed plan may decide to direct the trustee to provide some or all of the promised pensions by purchasing annuities from an insurance company as the employees retire. In that case, the plan will in fact be *pro tanto* an insured plan, but it will usually continue to be spoken of as a trusteed plan.

APPENDIX B

FEMALE AND MALE LONGEVITY

I. The Observed Data

Women have lived longer than men both in the United States and throughout the world. U.S. Census Bureau,[1] Social Security Administration,[2] and United Nations[3] references support this observation. Swedish records recount the observation as early as 1780.[4] Longevity experience among insureds has been recorded by the Society of Actuaries or its predecessors since 1892. The tables of the Society have consistently shown higher female longevity, for both women working inside and outside the home.[5] Thirty year-old women are observed to live 6.2 years, on the average, longer than their male

---

[1] U.S. DEPT. OF HEALTH, EDUCATION, AND WELFARE, PUBLIC HEALTH SERVICE, NATIONAL CENTER FOR HEALTH STATISTICS, VITAL STATISTICS OF THE UNITED STATES 1971, Vol. II, Pt. A, § 5 at 7-10 (1975).

[2] Bayo, *Mortality of the Aged*, 24 TRANSACTIONS, SOCIETY OF ACTUARIES, Pt. 1 at 1-24 (1972).

[3] UNITED NATIONS, DEMOGRAPHIC YEARBOOK 700-26 (23d ed. 1971).

[4] N. KEYFITZ & W. FLIEGER, WORLD POPULATION: AN ANALYSIS OF VITAL DATA 604-39 (1968).

[5] M'Clintock, *Special Tables for the Estimation of Mortality Among Annuitants*, 6 TRANSACTIONS OF THE ACTUARIAL SOCIETY OF AMERICA, 13, 22-23 (1900). With regard to both women working inside and outside the home, greater longevity is shown by life expectancies calculated from data in Peterson, *Group Annuity Mortality*, 4 TRANSACTIONS, SOCIETY OF ACTUARIES 246, 262-67 (1952). This was confirmed by calculations of life expectancies from data in Greenlee & Keh, *The 1971 Group Annuity Mortality Table*, 23 TRANSACTIONS, SOCIETY OF ACTUARIES, Pt. 1 at 569, 583-96 (1972) (hereinafter cited as *1971 Group Annuity Table*). Analysis of current data as to populations that include both women working inside and outside the home also show greater female longevity. *Report of the Committee on Group Annuities, Group Annuity Mortality* in TRANSACTIONS, SOCIETY OF ACTUARIES, 1975 REPORTS 287, 289-316 (1976).

counterparts, 50 year-old women live 5.7 years longer, and 65 year-old women live 4.1 years longer.[6] This observed data, as recorded by actuaries, is used as the best available predictor for the longevity of groups of persons insured under pension plans of employers.

II. The Reasons for Greater Female Longevity

Two principal factors have been suggested as explanations for greater female longevity: the biological factor and social and economic factors. We include a brief summary of part of that discussion, not because we believe it relevant to the issues in this case—a matter about which there is a difference of opinion—but because it may be of interest to the Court.

Amram Scheinfeld's book, *Your Heredity and Environment* (1965), discusses the question of biological factors. At pages 217-21 he asserts that bodily makeup and chemical functioning differ between women and men, and that these differences give women advantages in resisting or overcoming most diseases. He also observes that when male and female infants suffer the same accidents, the chances for death are greater for the males. As a reason for the longevity difference, he suggests that females originate with two X chromosomes and males originate with only one. If a female inherits an X chromosome that includes a recessive gene, a normal gene in the other X chromosome can compensate; males

[6] Calculated from *1971 Group Annuity Table, supra,* note 5 at 585-96. The insurance tables for persons insured under individual annuity contracts also show similar results: life expectancies for females are 5 years more at 30, 4.4 more at 50, and 2.9 more at 65. Calculated from data in Cherry, *The 1971 Individual Annuity Mortality Table,* 23 TRANSACTIONS, SOCIETY OF ACTUARIES, Pt. 1 at 475, 496-99 (1972). The group and individual mortalities differ because of the different populations that are covered by the two types of annuities. However, both exhibit a longer female longevity. Under individual annuities longer female longevity was also exhibited in life expectancies calculated from earlier data in Jenkins & Lew, *A New Mortality Basis for Annuities,* 1 TRANSACTIONS, SOCIETY OF ACTUARIES 369, 386-89 (1949); Current data under individual annuity contracts also confirm this. *Mortality Differentials by Sex,* in TRANSACTIONS, SOCIETY OF ACTUARIES, 1973 REPORTS 225, 228 (1974).

have no such compensating possibility. He cites as some evidence for his view the observation that in poultry, where the chromosome pattern is reversed, embryonic deaths are much higher among females. He writes that, since such factors as childbearing have become less hazardous, and as the habits and ways of living of both sexes have become more similar, "*under like conditions, females are better adapted to cope with most human afflictions* because they are genetically better constructed and have a more efficient chemical system." (Emphasis in original.)

Additional literature bearing on female longevity relates to prostaglandins, which effect the output and contractibility of the heart and tension in blood vessels. Women produce significantly less of this substance than men, and the substance is said by some to affect, in the greatest degree, the bodily functions associated with the causes of death that account for most of the variation in mortality by sex.[7]

One feature of the observed data warrants separate mention: it appears that, even during the present period when more women are entering work outside the home, the longevity advantage of women over men is increasing. One study indicates that since 1920 the overall ratio of male to female mortality has increased by over 60%.[8] The reasons for this apparent trend are not clear.

[7] Fellers & Jackson, *Non-Insured Pensioner Mortality, The UP-1984* Table, 25 PROCEEDINGS, CONFERENCE OF ACTUARIES IN PUBLIC PRACTICE 456, 468-69 (1976). *See also* Metropolitan Life Insurance Co., *Sex Differentials in Mortality,* 55 STATISTICAL BULLETIN 2, 5 (Aug. 1974).

[8] Metropolitan Life Insurance Co., *Sex Differentials in Mortality Widening,* 52 STATISTICAL BULLETIN 2, 3 (Dec. 1971). *See also Mortality Differentials by Sex,* in TRANSACTIONS, SOCIETY OF ACTUARIES, 1973 Reports 225 (1974); Metropolitan Life Insurance Co., *Sex Dif-*

A possible explanation is that recently expressed by Barbara J. Lautzenheiser, Vice President and Actuary, Bankers Life Insurance Company of Nebraska:

> ". . . as socio-economic conditions of the sexes are equalized, the biological differences are more apparent and the differences between mortality become greater." [9]

A factor lending some weight to this view is that perinatal mortality rates (stillbirths occurring beyond the 20th week after conception and deaths in the first week of infancy) are over 20% higher for males.[10] Such differences cannot be explained by other than biological differences, and current data indicates that the differences may continue to widen.[11]

On the other side, it has been pointed out that past working experience of women has contained few high tension jobs, and with women entering more of these jobs it is contended that in due course the observed differences in longevity will either be reduced or be explained as attributable to other causes.[12]

---

ferentials in Mortality, 55 STATISTICAL BULLETIN 2, 2-5 (Aug. 1974); Bayo & McKay, *U.S. Population Projections for OASDHI Cost Estimates*, ACTUARIAL STUDY No. 72 at 10 (U.S. Department of Health, Education and Welfare, Social Security Adm., Ofc. of the Actuary, July 1974).

[9] Lautzenheiser, *Sex and the Single Table: Equal Monthly Retirement Income for the Sexes?*, 2 EMPLOYEE BENEFITS JOURNAL, No. 1 at 8, 12 (Fall 1976).

[10] Metropolitan Life Insurance Co., *Reduction in Perinatal Mortality*, 43 STATISTICAL BULLETIN 6, 7 (May 1962).

[11] See, *e.g.*, "Fewer Heart Disease Deaths," Wall St. J., July 26, 1977, at 1, col. 3 (decline in heart disease projected by the Census Bureau to prolong women's lives by 4 years and men's lives by 3 years by next century).

[12] Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B.U. L. Rev. 624 n.2 (1973).

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, ET AL.,

Petitioners,

v.

MARIE MANHART, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA AND COLLEGE RETIREMENT EQUITIES FUND, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

WILLIAM R. GLENDON
200 Park Avenue
New York, New York 10017

Attorney for Teachers Insurance and Annuity Association of America and College Retirement Equities Fund

Of Counsel:

JAMES B. WEIDNER
JAMES W. PAUL
ROGERS & WELLS
200 Park Avenue
New York, New York 10017

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
INTEREST OF THE AMICI	2
RETIREMENT INCOME AND THE ANNUITY PRINCIPLE	4
(a) The Annuity Principle	4
(b) Risk Classification and Equity	5
(c) Cost Impact	7
THE DECISION BELOW	8
SUMMARY OF ARGUMENT	11
ARGUMENT	13
I. Title VII Does Not Prohibit The Recognition Of Differences In Male-Female Longevity In The Computation Of Rates For Retirement Plans	13
II. The Bennett Amendment In Title VII Requires Application Of Equal Pay Act Standards To This Case And Those Standards Sanction The Recognition Of Differences In Male-Female Longevity In Computing Rates For Retirement Plans	27
A. The Bennett Amendment	28
B. The Equal Pay Act	32
1. Legislative History	33
2. Administrative Interpretations	35
C. EEOC Guidelines	40
D. Effect of *General Electric Co.* v. *Gilbert*	45
CONCLUSION	48
ADDENDUM A	
TABLES 1-4	
ADDENDUM B	
Equal Employment Opportunity Commission v. *Colby College, et al.*, No. 75-136 SD (D. Me., Oct. 27, 1977)	

CASES

PAGE

Califano v. *Goldfarb*, 430 U.S. 199 (1977) 18, 25

Craig v. *Boren*, 429 U.S. 190 (1976) 18

Equal Employment Opportunity Commission v. *Colby College, et al.*, No. 75-136 SD (D. Me., Oct. 27, 1977) .....*passim*

Espinoza v. *Farah Mfg. Co., Inc.*, 414 U.S. 86 (1973) 45

Fleming v. *Nestor*, 363 U.S. 603 (1960) 25

Geduldig v. *Aiello*, 417 U.S. 484 (1974) 14, 15, 20

General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) .....*passim*

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971)..14, 15

International Bro. of Teamsters v. *United States*, 97 S. Ct. 1843 (May 31, 1977) 26, 44

Manhart v. *City of Los Angeles, Dept. of Water*, 553 F.2d 581 (9th Cir. 1976) .....*passim*

Reed v. *Reed*, 404 U.S. 71 (1971) 13, 15, 18

Stanton v. *Stanton*, 421 U.S. 7 (1975) 18

Turner v. *Dept. of Employment Security*, 423 U.S. 44 (1975) 20

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)..24, 25

STATUTES

Employee Retirement Income Security Act of 1974, P.L. 73-406, 88 Stat. 829 (1974) 2, 40

N.Y. Ins. Law (McKinney) § 209 6

5 U.S.C. § 553 (1966) 55

26 U.S.C. § 72(c)(3)(A) 40

29 U.S.C. § 206(d)(1) 33

PAGE

42 U.S.C. § 2000e-2(a)(1) 13

42 U.S.C. § 2000e-2(h) 3

42 U.S.C. § 2000e-12(a) 44

ADMINISTRATIVE INTERPRETATIONS AND REGULATIONS

29 C.F.R. § 1604.7(b) (1965) 41, 44

29 C.F.R. § 800.116(d) (1976) 36, 39, 40, 47

29 C.F.R. § 1604.8 (1976) 43

29 C.F.R. § 1604.9(f) (1976) 43

29 C.F.R. § 800.151 (1966) 39

41 C.F.R. § 60-20.3(c) (1974) 37

45 C.F.R. § 86.56(b)(2) (1975) 37

Treas. Reg. § 1.72-9, T.D. 6233 (1957) 40

Wage and Hour Opinion Letter, No. 257, May 27, 1964; [1961-1966 Transfer Binder] Lab. L. Rep. (CCH) ¶30,851 35

Wage and Hour Opinion Letter, No. 336, Jan. 22, 1965; [1961-1966 Transfer Binder] Lab. L. Rep. (CCH) ¶30,945 36

Wage and Hour Opinion Letter, No. 1117 (WH-70), August 25, 1970; [1964-1973 Transfer Binder] Lab. L. Rep. (CCH) ¶30,681 .....32, 38

Wage and Hour Opinion Letter, No. 1276 (WH-224), April 26, 1973, Lab. L. Rep. (CCH) ¶39,874 38

Opinion Letter of EEOC General Counsel (Oct. 12, 1965), [1966] Empl. Prac. Guide (CCH) ¶17,252.09 42

[1973] EEOC Decisions (CCH) ¶6300 43

Opinion Letter of EEOC General Counsel (July, 1966), [1966] 401 F.E.P. Rep. (BNA) 3011-12 .. 42

BILLS

	PAGE
H.R. 3861, 88th Cong., 1st Sess., § 4a (1963)	33
S. 882, 88th Cong., 1st Sess., § 4 (1963)	33
H.R. 6060, 88th Cong., 1st Sess., 7 (1963)	34
S. 1409, 88th Cong., 1st Sess., 6 (1963)	34

OTHER AUTHORITIES

Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Brooklyn L. Rev. 62, at 76, n.26 (1964)	31
110 Cong. Rec. 13646 (1964)	29
110 Cong. Rec. 13647 (1964) 29,	30
110 Cong. Rec. 13663-64 (1964)	29
111 Cong. Rec. 13359 (1965)	30
Ehrbar, *Those Pensions Plans Are Even Weaker Than You Think*, FORTUNE, pp. 104-114, (Nov. 1977)	27
37 Fed. Reg. 6836 (1972)	44
41 Fed. Reg. 48484-91 (1976)	40
Hearings on H.R. 12272; May 8, 1972	2
Lautzenheiser, *Sex and the Single Table*, Employee Benefits J. (Fall 1976)	24
New York Times, Nov. 7, 1977, at 55, c.1	27
T. O'Donnell, *History of Life Insurance In Its Formative Years*, (1936)	27
Opinion of Attorney General of the State of Washington (A.G.O. 1973, No. 21 (Oct. 11, 1973))	17
Pub. Health Service, U.S. Dep't of Health, Educ., and Welfare, Vital Statistics of the United States, Vol. II, Part A, pp. 5-8 (1972)	6
U.S. Civil Service Com., Annual Report, 1974	27

IN THE

Supreme Court of the United States

October Term 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, *et al.*,

Petitioners,

v.

MARIE MANHART, *et al.*,

Respondents.

BRIEF OF TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA AND COLLEGE RETIREMENT EQUITIES FUND, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

Preliminary Statement

By consent of all parties, Teachers Insurance and Annuity Association of America and College Retirement Equities Fund ("TIAA-CREF") submit this brief as *amici curiae* in support of petitioners. This brief points out: (a) the adverse and discriminatory impact that would result if private insurers such as TIAA-CREF were required to ignore differences in male-female mortality rates, and (b) the inappropriate deference accorded by the majority below to an EEOC guideline relating to the same subject.

Interest of the Amici

The Carnegie Foundation for the Advancement of Teaching established TIAA in 1918 as a non-profit New York life insurance company. CREF was created in 1952 by a special New York Act as a companion non-profit corporation. TIAA and CREF were founded to offer retirement and other fringe benefits plans suited to the needs of the teaching staffs and other employees of colleges and universities. Nearly 500,000 employees are covered by the system. Over 85 percent of all private four-year colleges and universities and over 40 percent of all public colleges and universities cover some or all of their personnel by TIAA-CREF annuity plans. A number of institutions have also adopted collective life insurance plans managed by TIAA-CREF, to complement the annuity plans. The TIAA-CREF system was cited as a model for recent Federal pension reform legislation.*

These retirement and insurance plans are normally established by board resolutions of the participating institutions, but there is no contract between TIAA or CREF and the employing institution. Each participating employee individually contracts directly with TIAA and/or CREF. Contributions are then made at equal rates by and on behalf of all similarly situated employees, regardless of sex. All similarly situated employees thus receive life insurance coverage and/or lifetime annuities, that have equal actuarial values.

---

*Employee Retirement Income Security Act of 1974 ("ERISA"), P.L. 73-406, 88 Stat. 829 (1974). Senator Jacob Javits, in testifying before the House Ways and Means Committee on this legislation, stated (Hearings on H.R. 12272, May 8, 1972):

> "We need to learn something from the success of the College Teachers Retirement System—'TIAA-CREF'—which would be a real model for private industry. . . ."

The TIAA-CREF plans therefore differ significantly from the instant retirement plan as to employee contributions, the essential fact on which the majority below, upon rehearing, based its decision concerning the Bennett Amendment. Unlike the plan here, greater contributions are *not* required in the TIAA-CREF system from employees of either sex. Accordingly, in this respect, the decision of the majority below has no application to the plans managed by TIAA-CREF, nor are we submitting this brief to address that question.

Our interest is two-fold. First, it has been argued that the decision of the majority below, requiring "individualized" treatment while simultaneously conceding its impossibility in an insurance context, means that an insurer such as TIAA-CREF purportedly violates Title VII whenever it takes into account acknowledged disparities in male-female longevity in computing its rates. Second, the majority of the Court below, misconstruing the import of the Bennett Amendment in Title VII (Civil Rights Act of 1964, § 703(a)(1) 42 U.S.C. § 2000e-2(h)), inappropriately deferred to a recent guideline of the EEOC concerning retirement benefits, that has also been urged as supposedly applicable to plans managed by TIAA-CREF.

Indeed, there has been a continuing effort to apply the decisions of the court below concerning the municipal plan involved here to annuity plans of private insurers such as TIAA-CREF. *See, e.g., Equal Employment Opportunity Commission* v. *Colby College, et al.*, No. 75-136 SD (D. Me., October 27, 1977) one of six litigations now pending in this country against educational institutions and TIAA-CREF.* Like all insurers issuing individual contracts, TIAA-CREF take the differing male-female longevity into

---

*Because of its applicability to the issues here and because it is as yet unreported, we have included Judge Gignoux' opinion in the *Colby College* case as Addendum B hereto.

account in computing life insurance and annuity benefit rates, because, as private insurers, they must accord equitable treatment to all of their participants and ensure the financial integrity of their plans.

The implications of proscribing recognition of those differentials in private insurance and annuities would be enormous; substantial questions as to financial integrity would arise and real inequalities would be created where none exists now. At a minimum, in the TIAA-CREF system alone, it would unnecessarily and improperly impose tens of millions of dollars of added costs upon the already strained resources of higher education. And it would unfairly cause increases in the costs of annuities and life insurance respectively for the millions of policy holders, male and female, throughout the country, and could well involve increased costs for the entire pension industry.

Retirement Income and the Annuity Principle

Although this case relates to fundamental insurance and annuity concepts, the courts below seemingly gave almost no consideration to them. Because such concepts, we submit, are basic to any discussion of this subject, let alone to any determination relating thereto, we set forth the following summary of those concepts as they relate to the lifetime pension benefits involved in this case.

(a) The Annuity Principle

The purpose of a pension plan providing lifetime benefits is to ensure that a retiree will receive an income throughout his or her life, an income that cannot be outlived. In essence, it is the reverse of life insurance—the pension income protects people against the financial risk of "living too long." In order to make such a plan financially viable, its actuary must know at the outset the extent of the plan's obligations, *i.e.*, how long benefits are expected to be paid.

The extent of the life span to be covered is obviously a basic element in this computation. But no one can predict how long a particular person will live after retiring. Thus, the plan's actuary must determine the cost of committing the plan to a rate of payments for life, without then knowing, or being able to determine in advance, the length of time for which payments will have to be made to any particular retiree.

By combining the risk applicable to a large enough number of persons, however, the actuary, by applying the law of large numbers, can make the necessary prediction on the basis of statistical fact. The rates at which funds must be accumulated in order to pay benefits to all retirees without exhausting the funds before the last retiree has died can thus be determined with precision. Each individual can be protected against outliving his or her retirement income and avoid the risk caused by the impossibility of predicting when any particular individual will die. This is the annuity principle, as applied to a pension plan of the type involved here. As noted, its operation depends upon application to large groups.

(b) Risk Classification and Equity

Insurers and pension plans can make accurate cost determinations among participants only by employing fundamental concepts of risk classification; that is, by identifying groups of persons who can be expected to exhibit the same degree of risk. The actuary must have a reliable basis for grouping individuals in risk categories or classes so that all persons within each class of persons present a similar risk of living or dying.

Each person within each class so identified can then be accorded the same expectation of benefits per dollar of cost to the plan, since all persons within the classes so estab-

lished present approximately the same risk, or probability of loss, to the pension plan or insurer. This is the principle of "equity". It is required for insurance and annuities by the laws of most states. (*E.g.*, N.Y. Ins. Law (McKinney) § 209).

Principles of risk classification are basic to insurance and retirement plans. Under insurance plans, for example, in order to attract a large enough group of individuals to form a pool so that the insurance will be economically viable, rates charged to individuals must be made fair and equitable. This is done by classifying insureds on the basis of risk factors which are significant, statistically measurable and directly related to the expected risk of loss. If individuals are forced to pay premiums which subsidize other persons' risks that are substantially greater than their own (*e.g.*, owners of brick homes near a fire department paying the same premiums as owners of wooden homes remotely located), they will eventually withdraw from the pool.

The object of classification for the funding and payment of lifetime pension benefits, then, is to classify into groups individuals having very close to the same risk in terms of longevity. Age is one factor in determining this risk. Obviously, a group of persons aged 55 can be expected to live more years than a group aged 65. The other immutable factor which has been statistically demonstrated to have a significant effect upon mortality rates is the sex of the individuals.* Statistics have consistently shown significantly lower mortality rates at every age among females than

*Although race is sometimes also mentioned in this respect, we are not aware of any data on annuitant mortality to support this view. To the contrary, the statistics which are available concerning the general population show that, at the higher ages (which are the ages relevant here), there is no significant difference in the longevity of whites and non-whites. These statistics also show that the *same* kind of differences in male-female longevity exist for non-whites as for whites. *See* Pub. Health Service, U.S. Dep't of Health, Educ., and Welfare, Vital Statistics of the United States, Vol. II, Part A, p. 5-8 (1972).

among males. It follows that when persons are classified for purposes of computing the costs of lifetime retirement incomes, women should be grouped with men having the same prospective mortality risk, or life expectancy—that is, with men who are several years younger. It would be no more realistic to place men aged 65 in the same risk classification as women aged 65 than it would be to place women aged 65 with women aged 60.

(c) Cost Impact

The effects of the differences in male-female mortality rates upon the retirement plan here can be seen easily from the Tables 1-3 included in Addendum A hereto. These Tables reflect the application of the mortality tables used by petitioners (A. 84) to groups of 100,000 males and 100,000 females, aged 65. The Tables were prepared by the actuaries of TIAA-CREF.

Table 1 demonstrates the survival experience of these groups. As confirmed by this Table, more women than men will survive at every age and, as a result, more payments will be required almost from the outset for many more women than men—at age 90, for example, to nearly twice as many.

The effect of greater female longevity also appears when the aggregate number of deaths to date is compared, as is done in Table 2. As shown there, 37 percent of the men, but only 25 percent of the women will have died at age 75. And, by age 85, 79 percent of the men will have died, compared with only 67 percent of the women. The greater number of male deaths means, of course, that fewer total payments are required for the surviving men as a group, than for the surviving women.

This need for additional payments to the women appears clearly from Table 3 in Addendum A, which compares the aggregate number of years that will be lived by the men and the women (men, 1,470,820 years, and women, 1,759,639 years). Converting these additional

years lived into the number of periodic payments that must be made during those years shows that, if the payments are made annually, the females will receive a total of about 300,000 more payments than the males.

Indeed, because of greater female longevity, nearly all of the women in the plan will have received more at the time of their deaths than the men who have died at the same points in relation to the remainder of their respective groups. This can be seen by comparing the total amount of periodic payments received by each of the males and females, according to the order in which they died (*i.e.*, beginning with a comparison of the man and woman who died first and proceeding with like comparisons to those who died last). This, of course, is the order in which retirement benefits cease. Such a comparison, using the data set forth in Tables 1-3, would show that nearly 100 percent of the women so compared will have received more payments (and, since the periodic payments in this retirement plan are equal, more dollars) than their male counterparts—still another reflection of the greater female longevity.

In sum, there can be no question as to the higher cost of providing retirement benefits of the same periodic amount to women as to men of the same age. To recognize this fact is not "discrimination" of any sort against anyone, and certainly not against the women. If a retirement plan is to remain solvent, a greater amount must be accumulated for the women than for the men of the same age, assuming the amounts are to be paid out in equal periodic amounts; or, if the same amounts are to be accumulated for both groups, the accumulations must be paid out in somewhat lower periodic amounts to the women.

The Decision Below

The Ninth Circuit recognized the "unique" nature of the issue here when it initially considered this case on appeal. It stated (553 F.2d at 586):

> "In the present case a relevant characteristic in determining how large an individual's retirement contribution should be is an informed prediction as to how long the person will live. But this characteristic, unlike those in the prior cases, is impossible to determine on an individual basis at the time when the contribution must be made. Thus, the policy of allowing relevant factors to be considered can be met only by allowing the group longevity statistics to be attributed to the individual members of the group."

Having conceded the impossibility of individual testing and analysis in the context of this case, the court nevertheless held in effect that such treatment is required by Title VII. Further, the Ninth Circuit rejected the applicability of section 703(h) of Title VII (the Bennett Amendment), which provides that differentiations on the basis of sex that are permitted under the Equal Pay Act are also permissible under Title VII. The Court of Appeals bottomed its decision on an administrative ruling by the EEOC which had concluded that generalizations relating to sex "cannot be permitted to influence the terms and conditions of an *individual's* employment, even where the generalizations are statistically valid." (553 F.2d at 591) (Emphasis in orignal).

The decision of this Court in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976) (hereafter, *"Gilbert"*) led to a rehearing. Two of the judges adhered to their original opinion. Referring to the legislative history of the Bennett Amendment that they had rejected in their initial opinion, these judges made the curious statement that: "We did not find it [originally] to be persuasive legislative history; the Supreme Court did find it persuasive." (553 F.2d at 593). Although agreeing that they were "bound by that conclusion" (*id.*), which was in conflict with their own, these

judges still concluded that their own original opinion was not in error.

All this led one of the judges on the panel, Judge Kilkenny, to reverse himself and to file a sharp dissent. He was convinced that the principles enunciated by this Court in *Gilbert* were controlling and that the standards of the Equal Pay Act sanctioned the instant practice. Suggesting that the majority was "playing with words" (553 F.2d at 595), he stated (at 597):

> "The majority's tortured views on the obvious breadth of *General Electric* become apparent in its writing around and failure to accept the Supreme Court's application of this regulation [under the Equal Pay Act]. This regulation, as I read it, contemplates the actuarial equivalent of the scheme before us. If employer contributions are equal for men and women, there is no statutory violation even though the resulting benefits are not equal as between men and women."

As the following analysis will show, Judge Kilkenny was correct. Under these circumstances, his concluding remarks present, we think, the proper rule (553 F.2d at 598):

> "One must sympathize with the plight of the appellants—a plan drawn up to comply with the regulations of the Wage and Hour Division will inevitably conflict with the recent regulations of the EEOC. This typifies the type of 'no win' situation alluded to by the Supreme Court in *General Electric* [429 U.S. at 140, n.18], and reinforces my conclusion that the discrimination, if any, fostered by this plan is of a type which did not concern Congress when enacting Title VII."

Summary of Argument

The majority below concluded that Title VII had been violated because each of the employees under the instant retirement plan was supposedly not treated as an individual, in that the plan required differing employee contributions from men and women, based upon mortality tables reflecting differences in male-female longevity.

The majority reached its conclusion by comparing men and women of the same age. But, in so doing, the majority was in fact comparing groups who were not similarly situated as to the essential element, life expectancy. Actuarial studies have consistently demonstrated that women, at every age, have lower mortality rates than men of the same age. Concepts of prohibited "discrimination" articulated by this Court have never proscribed treating different classes of persons differently. It is just as discriminatory to treat dissimilarly situated classes equally as it is to treat similarly situated classes differently.

There is nothing arbitrary or irrational about recognizing the conceded and objectively identifiable disparity in male-female life expectancy in computing rates for retirement plans. Far from constituting a mere pretext for discrimination against either sex, recognition of this difference in longevity ensures financial viability for the plans and equitable treatment for all participants.

It is unrealistic and unworkable to attempt to force an "individualized" analysis upon an insurance context. Unlike the possibility of testing job applicants for their qualifications before employment, there is simply no way to determine in advance when a particular person will die. (This, of course, is the reason that insurance and annuities exist). The majority below conceded that individual testing in this respect was impossible, but nevertheless concluded that Title VII had been violated. Hence, the majority's reasoning would lead to the possibility of entities being held liable

under Title VII for having failed to accomplish the impossible—a result which Congress could not have intended.

Insurance, by its nature, requires reference to groups. Accordingly, as we believe was confirmed by this Court in *Gilbert*, the measurement of equality in an insurance context should be made in terms of groups, not individuals. An employer complies with Title VII when it provides insurance coverage of the same value, or worth, to equal groups of men and women (*Gilbert* p. 139, n.17). In this case, the employer actually made greater contributions on behalf of the women than the men and, accordingly, provided the women with an income at retirement of a greater value than that provided for the men.

To require insurers to ignore the acknowledged differences in the mortality rates of men and women, as some have urged is indicated by the decision of the majority below, would create real inequalities where none exists now in private insurance plans such as those managed by TIAA-CREF. It would also unfairly impose increased costs upon both men (who would be charged higher rates for annuities) and women (who would be charged higher rates for life insurance). No such result is required by Title VII. Moreover, even if the recognition of the disparity in male-female longevity constituted "discrimination" under Title VII (and it does not), the recognition would be fully justified by the fundamental necessities of the business of insurance.

The majority below also deferred inappropriately to a recent guideline of the EEOC, in concluding that a violation of Title VII had occurred. In so doing, the majority erred, because: (1) the Bennett Amendment in Title VII requires that interpretations of the Equal Pay Act are also applicable to Title VII when, as here, claims of discrimination in compensation are made; (2) the legislative history and administrative interpretations of the Equal Pay Act show plainly that employers were to be permitted to continue recognizing the different risks arising from disparities

in male-female longevity, when computing costs or benefits under retirement plans; (3) the recognition of this differential is thus sanctioned by the standards of the Equal Pay Act; and, therefore, (4) it must also be permissible under Title VII.

As Judge Kilkenny recognized in his dissent below, this Court in *Gilbert* held, in referring to the same legislative history and Equal Pay regulation as are invloved here, that they constituted the proper interpretation of Title VII and were controlling over a contrary guideline of the EEOC. Indeed, Judge Edward T. Gignoux, in his recent, detailed opinion in *Equal Employment Opportunity Commission* v. *Colby College, supra,* annexed hereto as Addendum B, articulated precisely the analysis summarized above, in dismissing the EEOC's claim of Title VII "discrimination" in the private insurance and annuity plans at issue there.

ARGUMENT

I

TITLE VII DOES NOT PROHIBIT THE RECOGNITION OF DIFFERENCES IN MALE-FEMALE LONGEVITY IN THE COMPUTATION OF RATES FOR RETIREMENT PLANS

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer ". . . to discriminate against any individual . . . because of such individual's . . . sex. . . ." (42 U.S.C. § 2000e-2(a)(1)). The section thus requires a showing of "discrimination".

This Court has repeatedly held that, while prohibited discrimination may arise when persons in the *same* class are dissimilarly treated, it does not arise when persons in *different* classes are treated differently. As the Chief Justice stated for the unanimous Court in *Reed* v. *Reed*, 404 U.S. 71, 75 (1971): "This Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different

ways"—an analysis which is also of direct relevance to claims of "discrimination" under Title VII. *Gilbert* at 133, 145.

The court below in this case compared men and women of the same age in concluding that illegal discrimination had occurred. But the comparison actually concerned persons belonging to *different* classes as to life expectancy, the determinative issue. For, while the respective male and female groups may have been similarly situated in terms of age or employment history, they were not so situated as to the crucial factor—risk of mortality—that must be considered in the computation of rates for a retirement plan, the issue here. It is undisputed that, at every age, women on average have lower mortality rates than men of the same age.

Equality of treatment may be denied as much by application of a single standard to persons unequally situated as by application of different standards to persons equally situated. *See, Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). Insurance necessarily requires some differentiation, or "discrimination", among groups in *different risk classes.* (See pp. 5-8 *supra*). To require otherwise would cause grossly unfair treatment of the many insureds who would receive less value for their money in order to subsidize the cost of insuring risks far greater than their own.

This Court in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) and again in *Gilbert* rejected the contention, apparently accepted by the courts below in this case, that any dissimilar treatment of men and women on the basis of differences in risks and costs arising from attributes that may be unique to one of the genders, is prohibited. A criterion to be applied in such instances is whether the dissimilar treatment results from a condition that is "objectively identifiable." If so, such distinctions will not be proscribed, absent a showing that they are "mere pretexts designed to effect an invidious

discrimination against the members of one sex or the other. . . ." (*Aiello* at 496-97, n.20; *Gilbert* at 134-35).

The instant case, no less than *Aiello* and *Gilbert*, involves a distinction based, not upon gender as such, but upon different risks arising from an "objectively identifiable" condition associated therewith: differing male-female longevity. Here, the distinction is objectively identifiable through the use of established actuarial techniques. Males and females are placed in different classes, not because of their gender, *qua* gender, but because statistics indisputably show that at every age women as a group have lower mortality rates than do men of the same age and therefore present a correlatively greater risk of extended longevity.

Contrary to the opinion of the majority below, it is only invidious, or arbitrary and irrational, classifications that are proscribed both by the Constitution (*e.g., Reed* at 75) and by Title VII. As this Court stated in *Griggs* at 429-31 when describing the purpose of Title VII:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group. . . ."
>
> * * *
>
> "What is required by Congress is the removal of *artificial, arbitrary* and *unnecessary barriers* to employment when the barriers operate invidiously to discriminate on the basis of . . . impermissible classification." (emphasis added)

There is nothing arbitrary or irrational in the instant classification. The basis for it can easily be seen from the Tables included in Addendum A hereto. As appears there-

from, the women, as a result of their lower mortality rate, live many more years and therefore require many more payments over their lifetimes than the men of the same age. (See pp. 7-8 *supra*). Basic common sense therefore dictates that, if the plan is to remain solvent, either sufficient additional money must be contributed for the women, or the women must be paid their benefits at a lower periodic rate than the men. To recognize this undeniable fact is neither arbitrary nor irrational. To ignore it, is both arbitrary and irrational.

Nor does the recognition of the difference in male-female longevity in any way constitute a "mere pretext" (*Gilbert* at 134-35) to effect invidious discrimination against women or men. To the contrary, by taking into account the differences in risks and costs arising from this mortality differential, equitable treatment is obtained for all individuals. (See pp. 5-7, *supra*). Since it is actuarially established that women as a group live longer than men of the same age, it is entirely appropriate to group them with their counterparts of the same life expectancy, whether they be male or female.*

Compounding the foregoing errors, the courts below attempted throughout their opinions to force a rule which is aimed at protecting the employment rights of individuals, upon an insurance context, where groups, not individuals, are the essential component. This is perhaps nowhere more

*The absence of any gender-directed discrimination in this approach is immediately apparent from its application in many private insurance plans. Thus, in individual annuities, women may either pay somewhat higher premiums or receive lower periodic benefit payments than do men of the same age, but, in individual life insurance, men, for the same reason—greater female longevity—either pay somewhat higher premiums or receive lower death benefits than do women of the same age. The mortality data thus affects both sexes in the same fashion. Far from establishing any discrimination "against" one sex or the other as is proscribed by section 703(h) of Title VII, it proves that there is discrimination against neither.

clearly spelled out than in an Opinion of the Attorney General of the State of Washington (A.G.O. 1973, No. 21 (October 11, 1973)). There, it was determined that a state statute banning sex discrimination in insurance policies did not prohibit the sale of insurance which established different rates for males and females, based upon the differences in male and female life expectancy. The Opinion stated (p. 6):

> "The problem presented . . . has few parallels in the heretofore decided civil rights cases because ordinarily civil rights, like constitutional rights, belong to individual persons and not to classes of persons. Generalities about the class of persons to which the complainant belongs are usually immaterial to his or her rights under a civil rights statute, even if these generalities are true.
>
> * * *
>
> "Insurance, however, is something which by its very nature applies to classes of persons. Its function is to reduce *individual* risk by lumping persons together in classes, all members of the class then sharing the cost of the total risk of the class. A realistic application of a civil rights statute to insurance must, therefore, deal with the class characteristics of the insurance industry, and since most of decided cases dealing with civil rights take an 'individualistic' approach, they are thus of little assistance in resolving the present question." (Emphasis in original)

The "individualistic" approach, in short, is not realistic in its application to an insurance context. Previous cases which have found instances of improper "sex-stereotyping" have all involved circumstances where the capabilities of individuals could be tested individually. The court below

recognized the crucial significance of this factor. In referring to its earlier decision striking down a practice of a blanket refusal to hire woman for positions which entailed long hours of work and heavy physical effort, the Ninth Circuit stated (553 F.2d at 586):

> "An important basis of our decision was the fact that each individual woman applicant could actually be tested to see whether the relevant characteristic of strength was or was not in fact lacking."*

While it *can* and, therefore, must be determined whether a woman can lift a 40-pound weight or whether a man possesses the qualifications to be an airline cabin attendant, it *cannot* be determined in advance—which is the point at which an insurer must determine a rate of contribution and/or commit to a rate of payment—how long a particular man or woman will live. Individual "testing" for purposes of insurance or annuities, that is, forecasting years in advance when a particular person will die, is simply impossible. Again, the court below recognized precisely this (553 F.2d at 586):

> "[T]his characteristic [longevity], unlike those in the prior cases, is impossible to determine on an individual basis at the time when the contributions must be made."

*This same availability of individual testing has also been present in cases where this Court has found overbroad and arbitrary classifications. *E.g., Craig* v. *Boren*, 429 U.S. 190 (1976) (presumed that all females aged 18 were capable of drinking 3.2 beer while any male of the same age was not); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) (presumed that all widows required the financial assistance of survivors' benefits but that any widower did not); *Reed* v. *Reed, supra* (presumed that all male members of the military provided the principal financial support of their dependents, but that any female member did not); and *Stanton* v. *Stanton*, 421 U.S. 7 (1975) (presumed that all males required parental financial support until the age of 21, but that any female under 21 did not). In each of these situations, the presumptions under the statutes would not necessarily have any basis in fact. And, again of crucial importance, it was possible to determine on an individual basis the relevant requirements or capabilities of the persons involved.

Indeed, this Court has already considered and rejected exactly the same sort of unrealistic arguments that respondents urged upon the lower courts herein. In *Gilbert*, the respondents also argued for the application of an "individualized" analysis, even in an insurance context. In so arguing, the respondents there relied in part upon the District Court decision in *this* case. They argued that the rationale of the District Court here was properly applicable to retirement plans, stating:

> "[W]e believe that imposing on employees either unequal costs when benefits are equal or unequal benefits when costs are equal violates the right of each individual employee to be treated equally with each individual employee of the opposite sex without attributing to either the benefits or detriments of an average based on one sex as a group. . . ."*

The respondents' argument in *Gilbert* thus paralleled the rationale adopted by the court below in this case as to the alleged requirement for individual treatment. Referring to the quoted argument, however, this Court in *Gilbert* characterized it as the sort of "no-win" situation (429 U.S. at 140, n.18), which could not furnish the basis for a claim of improper "discrimination."

Insurance by its nature requires reference to groups. Accordingly, measurements as to the existence of alleged discrimination or discriminatory impact in an insurance context should be made by reference to groups, not to individuals. This was confirmed, we believe, by the opinion of this Court in *Gilbert*, the one decision of which we

*Supplemental Brief for Respondents on Reargument at 59, in *Gilbert*.

are aware in which this Court has considered alleged discrimination in the context of a private insurance system. *Gilbert,* in turn, followed the rationale articulated in *Aiello* concerning the state disability insurance plan at issue there.* The plaintiffs in both *Gilbert* and *Aiello* had claimed that the disability insurance plans at issue were unlawfully discriminatory because the plans excluded coverage of disabilities related to pregnancy while including all others. In rejecting those claims this Court stated (*Gilbert* at 138):

> "[W]e start from the indisputable baseline that '[t]he fiscal and actuarial benefits of the program . . . accrue to members of both sexes.'"

This Court found (*id.*) that the benefits of the program therefore did not operate

> "'. . . to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program,'."

Accordingly, in a particularly important passage, this Court held (*id.*):

> "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme. . . ."

---

*See, *Turner* v. *Dept. of Employment Security,* 423 U.S. 44 (1975), wherein this Court specifically contrasted the individualized approach with the principles which must control in an insurance context. There, following traditional individualized analysis, this Court invalidated part of the Utah employment compensation system because it withheld unemployment payments to all pregnant women during an 18-week period, even though their capacity to work could be determined on an individual basis. In so holding, the Court made clear that the case did not concern "coverage limitations or insurance principles central to *Aiello*" (*Id.* at 45).

Application of this analysis to the circumstances presented in this case confirms the absence of any Title VII violation. As Judge Kilkenny noted in his dissent upon rehearing in this case (553 F.2d at 596), the "fiscal and actuarial benefits" of this plan accrued to members of both sexes. The "aggregate risk protection" accorded to the women in fact exceeded that accorded to the men, as a result of the greater contributions made on behalf of the women than the men. Perhaps most importantly, the package was not "worth more to the men than to the women." Actually, the reverse was true, since the women, having had more contributed by the employer on their behalf, would reach retirement with benefits worth more than those for similarly situated men and, in the aggregate, would also receive more than the men. The court below found "discrimination" by looking at only half of the equation—that is, that the female employees paid somewhat more in contributions to the plan than did their male counterparts. The majority simply ignored the fact that, while the women paid more, they also received more in value.

The rationale followed by the majority was, as Judge Kilkenny recognized in his dissent, directly contrary to the reasoning of this Court in *Gilbert.* There, this Court made clear that, so long as an employer provided insurance of equal value to men and women, there was no requirement under Title VII that payment must also be made for an extra risk (there, pregnancy; here, longevity) which may be presented by one sex. This Court reasoned (429 U.S. at 139, n.17):

> "If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the 'insurance,' there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks

> would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the 'extra' disabilities due to pregnancy."

The Court continued (*id.*):

> "[T]he ultimate result is that a woman who wished to be fully insured would have to pay an incremental amount over her male counterpart due solely to the possibility of pregnancy-related disabilities. Title VII's proscription on discrimination does not, in either case, require the employer to pay that incremental amount."

So here. The employer would not have "discriminated" among its employees if it had provided no pension plan at all or had paid equal amounts on behalf of all employees, male and female. This would give rise to equal dollar accumulations prior to retirement and benefits of equal actuarial value for all employees upon retirement. Similarly, there could be no such claim if the employer had increased the salaries of all its employees, male and female, by equal amounts rather than contributing those amounts to the retirement plan, or had paid those amounts to the employees upon retirement in a single sum. In each of those events, a female employee who wanted to purchase an annuity paid at the same periodic rate as to a male of the same age would have to pay more than the male, in light of the extra risk arising from the longer female life expectancy. But, as stated in *Gilbert*, "Title VII's proscription on discrimination does not . . . require the employer to pay that incremental amount." (*id.*)

This Court specifically rejected in *Gilbert* any contention that social policy requires that an employer must provide greater value to members of one sex than to members

of the other, in order to avoid a claim of "discrimination" (429 U.S. at 139, n.17):

> "The District Court was wrong in assuming, as it did, 375 F. Supp., at 383, that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.' "

The decision of the majority below, while ostensibly aimed at eliminating supposedly over-broad generalizations, would have precisely the opposite effect. Ironically, for all their emphasis on individual treatment, the majority would have petitioners ignore the one most important fact in the entire controversy—that women as a group outlive men—and instead require that petitioners treat men and women less individually by presuming inaccurately that their expected life spans are identical. Petitioners would be forced to forego reliance upon a fact (as a group, women of any age live longer than men of the same age) that is demonstrably true and to resort to an assumption (women and men of the same age have equal life expectancy) that is demonstrably false.

The undisputed fact is that, because women as a group live more years than men of the same age and therefore require a greater number of benefit payments, it will cost more to provide any given amount of periodic retirement income to women than to men. This additional cost would continue to exist even if so-called "unisex" tables were adopted merging, or "averaging", the differing mortality rates of men and women. Adoption of such tables would not change the fact that women on average *do* live longer than men. Many more women than men would continue to sur-

vive each year, and, accordingly, many more periodic payments would continue to be made to them than to the men.*

If, as under "unisex", equal amounts were contributed by and on behalf of both men and women, the employer or insurer would be forced to take some of the funds contributed by and for the men and pay those funds to the women. Otherwise, the plan would exhaust the funds accumulated by and for the women before all of the women had died. This would be discriminatory in the extreme and would violate every concept of equity. As Judge Kilkenny noted in his dissent below (553 F.2d at 598, n.4):

> "[T]he available writing on the subject would indicate that the use of unisex life tables in connection with pension plans would not result in equal treatment, but rather in unjustifiable discrimination. U. S. Commission on Civil Rights, Civil Rights Digest [Winter 1977, pp. 45-6]."**

"Unisex" would in fact create a discrimination of the sort which this Court has already determined to be patently unconstitutional. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975). There, this Court invalidated a program granting survivors' benefits, based on earnings, to widows, but not to widowers. Noting that Social Security taxes had been deducted from the salary earned by the deceased wife of the plaintiff, Mr. Justice Brennan (at 645) described the particularly "pernicious" result of the program:

---

*As appears from Table 5 in Addendum A hereto, if "unisex" were applied to the TIAA-CREF system, a group of 100,000 women annuitants retiring at age 65 would require over the course of their lifetimes a total of almost *$3 billion* more than a like group of men during their lifetimes, assuming the same sized periodic annuity payments as shown.

**For a detailed discussion of the unfairness of "unisex" see Lautzenheiser, "Sex and the Single Table," Employee Benefits J. (Fall 1976). This analysis is now included on the syllabus of required reading for those attempting to pass the examinations required for accreditation by the American Society of Actuaries.

> "Thus, she not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others. . . ."

See also Califano v. *Goldfarb*, 430 U.S. 199 at 206 (1977).

The quoted observation was made, as noted, in the context of the Social Security system, a system of income transfers in which individual equity plays almost no part. The observation applies with even greater force to private insurance and annuity systems, where individual equity is essential.* Under "unisex", monies would be deducted from the salary checks of the men in order to contribute to a fund that would be used to make payments not to them, but to the women. Earnings would be taken away from men, simply because they are men, and given to women, simply because they are women, and for no other reason. "Unisex" would be no more than a sham, disguising the real discrimination it would create.**

**See, Fleming* v. *Nestor*, 363 U.S. 603, 610 (1960) ("[T]he noncontractual interest of an employee covered by the [Social Security] Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments."); and *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 647 n.14 (1975) ("[I]ndividual equity . . . accords benefits commensurate with the contributions made to the system. . . .")

**Some proponents of "unisex" have suggested that such a scheme should be mandated because the ages of death of men and women aged 65 may be matched and an "overlap" of approximately 80 percent will arise. Not only is any such comparison a misleading use of statistics because (a) it fails to match all of the members of the two groups in the order in which they die (and retirement benefits cease) and (b) it ignores the cumulative payments made to all the members of each group to that [illegible] (see p. 8, *supra*), but it really establishes nothing more than any [illegible] groups in different risk classi-

Even if it were concluded that recognition of the differing male-female mortality rates somehow constituted "discrimination" (and it does not), it would be fully justified in insurance by the fundamental necessities of that business. A practice claimed to violate Title VII may be justified, as this Court only recently confirmed, under the doctrine of business necessity. *International Bro. of Teamsters* v. *United States*, 97 S.Ct. 1843, 1855, n.15 (May 31, 1977) (A Title VII plaintiff must establish an invidious "impact" which "fall[s] more harshly on one group than another and cannot be justified by business necessity"). *See also, Griggs* at 431 ("The touchstone is business necessity.")

As discussed, insurance and retirement plans, by nature, depend upon groups, and the continuing viability of such plans requires application of principles of risk classification. Equitable treatment, as previously noted, is required by law for insurers such as TIAA-CREF. It is also essential to the financial stability of any insurance plan. History has repeatedly demonstrated the dismal results of systems that failed to accord equitable treatment.* And, reference need only be made to the increasing number of reports of the precarious financial position of numerous private and public

fications may be "overlapped". For example, the dates of death of a group of women aged 65 may be matched with those of a group of *women* aged 60, giving rise to an "overlap" virtually identical to that which appears when groups of men and women aged 65 are compared. Such an "overlap" proves the speciousness of this entire approach, since it would lead to the illogical and unworkable conclusion that women aged 60 must be paid benefits at the same rate as women aged 65. "Unisex", in short, would make no more sense than "uniage."

*This was graphically demonstrated, for example, in the early days of insurance with the collapse of insurers which followed a method of risk sharing known as "Assessment Insurance." This method developed in England during the last century when it was assumed the fairest way to operate an insurance pool was to charge each insured an equal rate, regardless of age and sex. The rate was calculated annually in light of the actual death benefits of members of the pool and assessed pro-rata among the survivors. The result was that, while persons in poor health entered and stayed in the pool, those persons

retirement systems, to understand the necessity of accurate actuarial data and projections.*

In summary, the courts below erred in concluding that petitioners had effected an invidious and unjustified discrimination or discriminatory impact against women in violation of Title VII.

II.

THE BENNETT AMENDMENT IN TITLE VII REQUIRES APPLICATION OF EQUAL PAY ACT STANDARDS TO THIS CASE AND THOSE STANDARDS SANCTION THE RECOGNITION OF DIFFERENCES IN MALE-FEMALE LONGEVITY IN COMPUTING RATES FOR RETIREMENT PLANS.

The majority of the panel in the Ninth Circuit on rehearing adhered to its initial conclusion of "discrimination",

in good health, realizing that such an arrangement was inequitable and to their disadvantage, avoided it. Similarly, persons of advanced age with a correspondingly higher risk of dying stayed in the pool, and younger persons avoided it. The withdrawal from and avoidance of the pool by the better risks resulted, in turn, in higher rates of claims and premiums. Eventually, the premium rates were so high that the remaining members of the pool could not afford them, and the insurance scheme collapsed.

The early Fraternal societies set up in this country during the early 19th and 20th centuries, often by immigrant groups, experienced a similar development. In these Societies, the premiums paid by the older members were, typically, not sufficiently greater than those of the younger members to carry the greater risks of such matters as, for example, burial expense. The Societies were therefore often forced to resort to extra assessments of the remaining members to cover the excess costs, tending to drive out the younger members and increase the burden on the members remaining. This, in many cases, caused the insolvency of the Societies. *T. O'Donnell*, History of Life Insurance In Its Formative Years, (1936).

**See, for example:* Ehrbar, *Those Pension Plans are Even Weaker Than You Think, Fortune* magazine, Nov. 1977, pp. 104-114 (industrial pension plans reported to be underfunded by at least $50 billion); *Rail Pension Fund Said to Face Possibility of Depletion by 1986, New York Times*, Nov. 7, 1977, p. 55, c.1 (Railroad Retirement System reported to have insufficient funds to continue to meet required pension benefits); and U.S. Civil Service Commission, Annual Report, 1974, p. 4 (United States Civil Service pension system underfunded by $77 billion as of 1974).

despite the Bennett Amendment, which excludes compensation practices permitted under the Equal Pay Act from the proscription of Title VII, and the holding of this Court in *Gilbert* as to the import of that section. It was because of this adherence that Judge Kilkenny reversed his earlier concurrence and filed his sharp dissent on rehearing. As the following analysis will show, Judge Kilkenny was correct.

A. The Bennett Amendment

The Equal Pay Act (29 U.S.C. § 206(d)) was enacted in 1963 by the 88th Congress in order to ensure equal pay for equal work for both men and women. In so doing, Congress included express exceptions intended to permit employers to continue recognizing certain kinds of differentials including, as will appear, the difference in insurance risks and costs arising from disparities in male-female longevity. The same Congress enacted Title VII in 1964. Conscious of the potential for conflict between application of the exceptions in the Equal Pay Act and the proposed inclusion of sex within the proscription of Title VII, Congress was careful to include an additional sentence in Section 703(h) of Title VII to reconcile any such conflict. That sentence provides:

> "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [the Equal Pay Act]".

This provision, generally known as the "Bennett Amendment," thus manifests the plain intent of Congress to provide that any possible conflict between the require-

ments of Title VII and of the Equal Pay Act, in situations where both apply, is to be resolved in favor of the Equal Pay Act. The Bennett Amendment was adopted by the Senate on June 12, 1964 (110 Cong. Rec. 13647), two days after the Equal Pay Act, passed by the same Congress in its first session, had become effective. In explaining his Amendment to Title VII at the time it was offered, Senator Bennett stated on the Senate floor (110 Cong. Rec. 13646):

> ". . . last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.
>
> "By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.
>
> "The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified."

Senator Humphrey, the floor manager of Title VII, also indicated his understanding that the Amendment was designed to permit differences in the treatment of males and females under benefit plans. The following exchange reveals Senator Humphrey's advice to the legislators (110 Cong. Rec. 13663-64 (1964)):

> "MR. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota [MR. HUMPHREY], who is the effective manager of the pending bill, a clarifying question on the provisions of Title VII.

> Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law?
>
> MR. HUMPHREY. Yes. That point was made unmistakeably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it."

Senator Dirksen, minority leader when the Bennett Amendment was passed, confirmed the congressional intent, when he stated during the debate on that bill, (110 Cong. Rec. 13647 (1964)):

> "We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carried certain exceptions. All that the pending amendment does is recognize those exceptions, that are carried out in the basic act."

The following year, on July 11, 1965, shortly before Title VII was to become effective, Senator Bennett reiterated the purpose of his earlier amendment in order to ensure that no misunderstanding would exist as to its meaning. He then stated in the Senate (111 Cong. Rec. 13359 (1965)):

> "Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act."

The language of the Bennett Amendment thus is mandatory: "It *shall not* be an unlawful employment practice

for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid. . . ." (emphasis supplied) where the differentiation is authorized by the Equal Pay Act. Practices permitted under the Equal Pay Act exceptions are permitted under Title VII. And, it is not only the express statutory provisions of the Equal Pay Act that govern in instances of overlap with Title VII. The administrative interpretations of the Equal Pay Act must also prevail. This Court left no doubt in this regard in *Gilbert*. There, Mr. Justice Rehnquist, speaking for the majority, stated (429 U.S. at 144):

> "Because of this [Bennett] amendment, interpretions of § 6(d) of the Equal Pay Act are applicable to Title VII as well. . . ."

Indeed, it would be patently anomalous to urge that Congress had deliberately and specifically incorporated the standards of the Equal Pay Act into Title VII, yet had delegated the interpretation of those identical standards to one agency for purposes of the Equal Pay Act itself and to another for Title VII.*

In short, there can be no dispute that, in enacting Title VII, Congress foresaw that conflicts could arise in the application of that statute and the Equal Pay Act exceptions. By including the Bennett Amendment in Title VII, Congress provided a statutory method of reconciling any such conflicts: interpretations of the Equal Pay Act were to control. Judge Gignoux put it succinctly in *Equal Em-*

---

*As one commentator has observed:

> "It might be argued, that the Bennett Amendment is not directed at conflicts between the two statutes so much as the conflict of interpretations between the Wage-Hour Administrator and the Equal Employment Opportunity Commission." Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Brooklyn L. Rev. 62, at 76 n.26 (1964).

ployment Opportunity Commission v. *Colby College, et al.*, annexed as Addendum B hereto (pp. 6-7):

> "Both the language of the Bennett Amendment and its legislative history disclose the plain intent of Congress to avoid subjecting employers to two conflicting standards, those of Title VII and those of the then recently enacted Equal Pay Act, and to provide that any possible conflict between the requirements of Title VII and of the Equal Pay Act is to be resolved in favor of the Equal Pay Act."

Such analysis, as Judge Kilkenny recognized in his dissent upon rehearing below, has direct application here.

B. The Equal Pay Act

The Equal Pay Act, as noted, was intended to ensure that all employees, male or female, received equal pay for equal work. In passing this Act Congress, however, expressly provided that not every disparity in compensation was to be prohibited. Section 6(d)(1) of the Equal Pay Act provides in part that no employer shall discriminate:

> ". . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work . . . except where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex. . . ."

In the retirement plan here the amount of contributions on behalf of the women actually exceeded those on behalf of the men, because of the greater cost for the female benefits. Thus, as these contributions are part of wages,*

*See, Wage and Hour Opinion Letter No. 1117 (WH-70), August 25, 1970; CCH Lab. L. Rep. Transfer Binder W-H Adm. Rulings, March 1969-June 1973, ¶30,681.

it cannot be said that petitioners were paying compensation to the female employees "at a rate less than that at which" the male employees were paid. Respondents' complaint is that, while the employer paid a greater amount for women than for men toward a large portion of the pension costs, the women, too, contributed more than did the men toward the remaining portion of the costs, also as a result of the disparity in risks and costs arising from the difference in male-female longevity. A review of the legislative history and administrative interpretations of the Equal Pay Act removes any possible doubt that recognition of such a differential in risks and costs is permissible.

1. Legislative History

The Equal Pay Act specifically excepts from its provisions any differential in wages based "on any other factor other than sex" (29 U.S.C. § 206(d)(1)(iv)). The legislative history of the Act demonstrates beyond question that differences in insurance or annuity rates resulting from the disparity in mortality risks is precisely the sort of "differential" intended by this provision.

In the original subcommittee version of the bill, the sole exception to the equal pay rule would have permitted differentials between males and females only when based upon a "seniority or merit increase system."* All the organizations which testified against the bill at the Senate and House hearings in March and April 1963, however, raised the objection that it cost more to employ females than males, and that these added expenses were a proper jus-

*Section 4(a) of H.R. 3861, printed in Hearings on H.R. 3861 and Related Bills, before the Special Subcommittee on Labor of the House of Representatives, 88th Cong., 1st Sess. (1963) (hereinafter "Hearings-House", at 3); Section 4 of S.882, and §4(a) of S.910, printed in Hearings on S.882 and S.910, before the Subcommittee on Labor of the Committee on Labor and Welfare, United States Senate, 88th Cong., 1st Sess. (1963) (hereinafter "Hearings-Senate"), at 2, 6.

tification for wage differentials. *See* Hearings-House at 96-98, 102-04, 137, 146-47, 158, 184-86, 189, 194, 241-44, 251-52 and 255-57; Hearings-Senate at 114, 130, 134-35 and 141-50. One of the specific examples cited as an increased cost to employ female workers was the additional cost of providing retirement benefits due to greater female longevity. Hearings-Senate, at 142 and 145; Hearings-House, at 103, 184-86 and 241.

As a result of these observations, the bill, as reported out of the Committees in both Houses of Congress, included a new provision that exempted from the requirement of equal pay "a differential based on any factor other than sex", thus giving recognition to the differential in employment costs arising from differences in male-female longevity.* The Senate Report (No. 176) on the bill specifically noted the longevity problem at issue here:

> "During the course of the hearings, testimony was introduced on the question of the cost which employers encounter in the employment of women which they do not encounter in the employment of men . . . Some employers stated that the cost of their pension and welfare plans were higher for women than men . . . because of the longer life span of women in pension benefits."**

The Report then stated that such differences in cost would constitute a "factor other than sex" justifying a differential in wages (*id.*).

*H.R. 6060, quoted in H.R. Rep. No. 309, 88th Cong., 1st Sess., 7 (1963); S.1409, quoted in S. Rep. No. 176, 88th Cong., 1st Sess., 6 (1963).

**An employer's cost is necessarily greater for women than for men, where the periodic annuity payments made to both are equal, since, given the greater female longevity, more periodic payments will have to be made to the women than to the men. Conversely, an employer's cost for life insurance providing equal death benefits to men and women would be greater for men than for women.

In short, the legislative history shows that Congress intended to continue to permit differentials in pension rates resulting from the differences in male-female longevity.

2. Administrative Interpretations

The administrative interpretations of the Equal Pay Act, consistent with its legislative history, clearly permit computation of rates for retirement benefits based upon mortality tables that reflect the differing male-female longevity. The Department of Labor is the governmental entity given jurisdiction over enforcement of the Equal Pay Act, and the Wage and Hour Administrator of that Department is charged with enforcing it.

Even before the Equal Pay Act became formally effective in June 1964, the Wage and Hour Administrator had addressed the subject question. In an Opinion issued on May 27, 1964, the Administrator ruled that equal employer contributions to an insurance plan would not violate the Equal Pay Act even though unequal periodic benefits may result.* Less than a year later, on January 22, 1965, the Administrator again addressed the issue and ruled that employee benefit plans met the requirements of the Act if either the employer's contributions or the periodic benefit payments to employees were equal.** And, in September

*Specifically, this Opinion in part stated:

> "It is our opinion that equal insurance premium payments by the employer on behalf of male and female employees would not result in any violation of the equal pay provisions regardless of difference in benefits."

Wage and Hour Opinion Letter, No. 257, May 27, 1964; [1961-1966 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,851.

**There, the Administrator stated in part:

> "The Divisions have taken the position that where benefits such as insurance are furnished to employees by the employer and the actual amount of payments made or costs incurred

1965, when the Wage and Hour Administrator issued formal interpretative regulations under the Act, the matter was specifically covered in a regulation that this Court in *Gilbert* subsequently found to support ". . . what seems to us to be the 'plain meaning' of the language used by Congress when it enacted . . ." Title VII (429 U.S. at 145). Following the rationale of the earlier Wage and Hour Opinions, this regulation, 29 C.F.R. § 800.116(d) (1976) provided:

> "If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees."

In short, the Wage and Hour Administrator from the outset recognized the reality that any retirement plan must face: given the universally acknowledged longer average life span for women as compared to men, either (a) more money will have to be contributed for the women in order

---

by the employer on behalf of men and women employed on equal work are equal, the fact that benefits are unequal will not result in a prohibited wage differential. Also, if the benefits provided by such a plan are equal, the fact that payments made on behalf of men and women are unequal will not be considered a violation of the equal pay provisions."

Wage and Hour Opinion Letter, No. 336, Jan. 22, 1965; [1961-1966 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,945.

to pay periodic benefits at the same level as to men of the same age, or (b) the benefits will have to be paid to the women at a somewhat lower periodic level than to the men. The Administrator thereby continued to permit the flexibility needed if viable retirement plans are to be fashioned for a variety of contexts—from higher education, where, for example, employee mobility may be essential to career advancement, to private industrial plans where other factors may be more important.

The same approach has been followed by every other administrative agency with authority over this area*, except, as will be discussed, the EEOC. Each of these agencies, except the EEOC, have recognized that the same total amount of money simply cannot be paid out in the same periodic amounts over different periods of time.

The Wage and Hour Administrator reiterated the plain import of the above quoted regulation in two subsequent Opinions, one on August 25, 1970 and another on April 26, 1973. In the August 1970 Opinion, the Administrator confirmed that matters relating to retirement plans were covered by the Equal Pay Act and ruled:

> "This is in further reference to your letter in which you inquired about the application of the equal pay provisions to the amounts an employer contributes toward a retirement or pension plan in behalf of his employees.
>
> * * *
>
> ". . .[W]here the employer's contributions to such a plan are equal for both men and women, no wage differential prohibited by the equal pay provisions

---

*Office of Federal Contract Compliance, 41 C.F.R. § 60-20.3(c) (1974); Department of Health, Education and Welfare, 45 C.F.R. § 86.56(b) (2) (1975).

> will result from such payments, even though the benefits which accrue to the employees in question may be greater for one sex than for the other."*

The April 1973 Opinion again repeated the same approach and also rejected any suggestion that the Department of Labor intended to follow the contrary approach which, by then, had been set forth in a contrary guideline of the EEOC (see *infra*).**

In short, the Department of Labor has consistently and correctly interpreted the Equal Pay Act as permitting employers to recognize the differing costs of providing retirement benefits for men and women. Plainly, if the instant plan, like those managed by TIAA-CREF, had provided for equal contributions by and on behalf of men and women, it would have been sanctioned under the Act. *Equal Employment Opportunity Commission* v. *Colby College, et al.,* included as Addendum B hereto. In this case, as noted, the employer actually contributed a greater

---

*Wage and Hour Opinion Letter No. 1117 (WH-70), Aug. 25, 1970; [1964-1973 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,681.

**In the April 1973 Opinion, the Administrator stated:

> "Specifically you ask: 'If an employer makes equal contributions to a retirement plan covering male and female employees but if, as a result of separate actuarial tables used by the plan's administrators, the female employees, other things being equal, receive smaller monthly retirement benefits, is the employer in violation of the equal pay provisions?'
>
> "In response to your initial question, our opinion letter of August 25, 1970 [W & H Opinion Letter No. 1117], sets forth our current position under the Equal Pay Act. We are cognizant of the recent amendments to the Civil Rights Act and the Guidelines issued by Equal Employment Opportunity Commission (EEOC) on pension benefits and we will continue to watch developments in this area. However, we do not anticipate any change in our position in the immediate future.

Wage and Hour Opinion Letter No. 1276 (WH-224), April 26, 1973; Lab. L. Rep. (CCH) ¶ 39,874.

amount on behalf of women than men. The majority of the Ninth Circuit nevertheless concluded upon rehearing that this plan was not sanctioned, because it involved unequal employee contributions corresponding to the unequal costs. While this holding thus would not apply to the plans managed by TIAA-CREF, the holding, we suggest, is illogical and ignores the underlying rationale of the regulation and other applicable interpretations of the Department of Labor under the Equal Pay Act. As Judge Kilkenny put it in his dissent below (553 F.2d at 597):

> "This regulation [29 C.F.R. § 800.116(d) (1976)], as I read it, contemplates the actuarial equivalent of the scheme before us. If employer contributions are equal for men and women, there is no statutory violation even though the resulting benefits are not equal as between men and women. The majority fails to appreciate the significance of this. In the context of pension plans, this rule makes sense only if it is read to impliedly authorize the funding of employee pension plans upon the basis of separate mortality tables. This regulatory justification for a plan with equal contributions and unequal benefits cannot be ignored in the variation before us."

In reaching its conclusion on rehearing, the majority (553 F.2d at 593-94) relied upon an Interpretative Bulletin which the Wage and Hour Administrator had published in February 1966 (29 C.F.R. § 800.151). The Bulletin also was urged upon this Court in *Gilbert* as controlling over 29 C.F.R. § 800.116(d) (1976).* This Court rejected that argument in *Gilbert,* and it has no greater

---

*Supplemental Brief for Respondents on Reargument at 40, in *Gilbert.*

application here. Indeed, as Judge Kilkenny noted (553 F.2d at 597), the "vitality" of the Bulletin was questionable in any event after *Gilbert*. Moreover, the purport of the Bulletin was obviously not meant to relate to questions concerning rates under insurance or retirement plans, which questions were encompassed specifically by 29 C.F.R. § 800.116(d) and by the subsequent August 1970 and April 1973 Opinions of the Wage and House Administrator, both of which were issued *after* the February 1966 Bulletin had been published.

C. **EEOC Guidelines**

The legislative history of Title VII is devoid of any suggestion that Congress intended in 1964 that that statute would touch upon the use of mortality tables reflecting differences in male-female longevity. Indeed, as this Court has noted, the legislative history of Title VII's proscription against discrimination by sex is, except for the Bennett Amendment, "notable primarily for its brevity." (*Gilbert* at 143). Such a suggestion of Congressional intent would, in fact, be contrary to subsequent indications. For example, the Pension Benefit Guarantee Corporation, the agency established by Congress to insure pension plans under its recent pension reform legislation* has already expressly provided in an interim regulation for the use of precisely such data based mortality tables in the evaluation of retirement plan benefits. *See*, 41 Fed. Reg. 48484-91 (1976).**

---

*Employee Retirement Income Security Act of 1974 ("ERISA"), P.L. 93-406, 88 Stat. 829.

**The Federal tax laws also continue to use actuarial tables that recognize the difference in male-female longevity in the computation of annuity income resulting in different periodic tax burdens as between men and women. I.R.C. § 72(c)(3)(a); Treas. Reg. § 1.72-9, T.D. 6233 (1957).

An initial question therefore exists as to whether the issue of alleged "discrimination" in the use of the subject mortality tables was ever intended to be covered in any fashion by Title VII. There is even a greater question as to whether the EEOC had authority to issue any regulations on this subject. As is stated in *Gilbert*, "Congress, in enacting Title VII, did *not* confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title." (429 U.S. at 141; emphasis supplied). The EEOC was only given authority from time to time to issue "procedural" requirements (*Gilbert*, id., n.20).

Whatever may be the status of the EEOC's guidelines, however, that agency initially recognized the primacy of the Equal Pay Act and the Wage and Hour Administrator's interpretations as applicable to Title VII. On November 22, 1965, almost immediately after Title VII had become effective, the EEOC issued a guideline (29 C.F.R. § 1604.7(b) (1965)) which, under the heading, "Relationship of Title VII to the Equal Pay Act," stated in part:

> "(a) Title VII *requires* that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, *the Commission interprets section 703(h) [The Bennett Amendment] to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII.*
>
> * * *
>
> (b) Accordingly, the Commission *will* make applicable to equal pay complaints filed under Title VII

> the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. . . . Relevant opinions of the Administrator interpreting 'the equal pay for equal work standard' *will* also be adopted by the Commission." (Emphasis supplied.)

This guideline confirmed the position that had been enunciated by the EEOC's own General Counsel in an Opinion dated October 12, 1965.* Subsequently, in July, 1966, the General Counsel of the EEOC addressed the matter at issue here and, following the approach previously taken by the Wage and Hour Administrator, ruled:

> "The Commission . . . does not feel that an employer commits an unlawful employment practice by contributing to or negotiating insurance programs which provide different benefits for male and female employees based upon reasonable actuarial considerations required by insurance underwriters. Nor does the Commission believe that a violation of Title VII occurs when male and female employees receive the same benefits, but the employer's contributions to the plan differ, depending upon the sex of the employee."**

*That Opinion had stated in part:

> "Section 703(h) [of Title VII] merely incorporates by reference into Title VII the enumerated defenses set forth in the Fair Labor Standards Act (which were added to that Act by the Equal Pay Act of 1963), together with such interpretative rulings thereon as the Wage-Hour Administrator has made or may make. Thus, where there is inequality of compensation pursuant to . . . (4) a differential based on any factor other than sex, such discrimination in payment is permissible under Title VII."

EEOC Opinion Letter (Oct. 12, 1965) [1966] Empl. Prac. Guide (CCH) ¶17,252.09.

**[1966] 401 F.E.P. Rep. (BNA) 3011-12.

For seven years after the enactment of Title VII, the EEOC followed the legislative history and mandate of the Bennett Amendment in adopting under Title VII present and future Equal Pay interpretations, including those discussed above.* Nevertheless, in 1972, the Commission inexplicably issued new, superseding guidelines (29 C.F.R. §1604.8) which, again under the heading "Relationship of Title VII to the Equal Pay Act," stated:

> "(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII.
>
> "(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, *but will not be bound thereby.*" (Emphasis supplied.)

And, simultaneously, the Commission, for the first time, announced in other guideline (29 C.F.R., §1604.9(f)):

> "It shall be unlawful employment practice for an employer to have a pension or retirement plan which . . . differentiates in benefits on the basis of sex."

Thus, the EEOC's guidelines, after seven years, attempted to turn 180° on this issue in 1972. Initially, recognizing and accepting the plain import of the Bennett Amendment, the EEOC announced that it would be bound by Equal Pay Act interpretations. ("Title VII *requires*

*As late as 1971 the EEOC stated in a Decision that ". . . § 703(h) [the Bennett Amendment] was intended to ensure consistency in the administration of Title VII and the Equal Pay Act." [1973] EEOC Decisions (CCH) ¶6300.

that its provisions be harmonized with the Equal Pay Act", and that "the Commission *will* make applicable . . ." Equal Pay Act interpretations. (29 C.F.R. § 1604.7(b) (1965) (emphasis added). Seven years later, in patent contravention of the Bennett Amendment, the EEOC announced that, not only would it *not* be bound by such interpretations, but that it was proscribing precisely the same practice that the Equal Pay Act continued to permit.*

In so doing, the EEOC acted inappropriately. It could not properly reverse its mandated compliance with the Bennett Amendment unless Congress had changed the law, which it had not. The law now, as in 1965, is that, where conflict exists between the Equal Pay Act and Title VII concerning alleged discrimination in wages or compensation, interpretations under the Equal Pay Act control. Although Title VII was amended in 1972, that amendment and legislative discussions relating thereto have no bearing on the issues here. This case concerns the provisions and purport of Title VII as it was enacted in 1964. The irrelevance of the 1972 amendments therefore could not have been made any clearer than it was by this Court in *International Bro. of Teamsters* v. *United States*, 97 S.Ct. 1843, 1864, n. 39 (May 31, 1977):

> "[T]he section of Title VII that we construe here, § 703(h) [which contains the Bennett Amend-

*These guidelines, we note, are anything but "procedural", even though that, as discussed *supra*, was the only subject matter authorized by Title VII to be included in regulations. Moreover, even in the promulgation of procedural regulations, the EEOC is required to conform ". . . with the standards and limitations of the Administrative Procedure Act." 42 U.S.C. § 2000e-12(a). No such "conformity" occurred concerning the 1972 guidelines. Indeed, the EEOC has conceded (37 Fed. Reg. 6836; April 5, 1972) that the 1972 guidelines did *not* follow the provisions of the Administrative Procedure Act which require (5 U.S.C. § 553 (1966)) notices of proposed rule makings, and opportunity for public participation, and a delay in the effective date.

> ment], was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII . . . are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls."*

In short, the Bennett Amendment now, as in 1964, requires that interpretations under the Equal Pay Act be applied under Title VII. By refusing to be bound by Equal Pay interpretations and announcing a new guideline directly contrary thereto, the EEOC improperly attempted to write the Bennett Amendment out of Title VII. The EEOC's action thus is even more egregious than the sort of administrative turnabout described by this Court in *Gilbert* (at 142-43). This, when combined with the other patent deficiencies in the EEOC's 1972 guideline (see *infra*), shows plainly that no deference is due to that guideline. *Gilbert* at 142-45; *Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86, 94-95 (1973).

D. Effect of *General Electric Co.* v. *Gilbert*

In *Gilbert* the plaintiffs had relied upon a 1972 guideline of the EEOC, stating that it was a violation of Title VII to exclude pregnancy-related disabilities from a disability plan. This Court rejected the plaintiffs' contention. Instead, this Court held that the regulation of the Wage and Hour Administrator discussed above was the proper interpretation of Title VII (429 U.S. at 140-45).

*To the extent that the 1972 amendment to Title VII (which simply extended the coverage of the Act to additional employers and made some procedural changes) has any relevance at all to this issue, it is that the amendment made no change whatsoever in the Bennett Amendment, thus confirming its continuing importance.

In so doing, this Court noted that the EEOC's guideline was neither contemporaneous with Title VII nor consistent with earlier EEOC guidelines on the same subject. In this case, too, the EEOC's 1972 guideline (enacted at the same time as the guideline involved in *Gilbert*) is neither a contemporaneous interpretation of Title VII nor consistent with earlier guidelines of the EEOC. Judge Gignoux put it well in discussing exactly this subject in *Equal Employment Opportunity Commission* v. *Colby College, et al.* After reviewing the background of the EEOC guideline proffered by the plaintiffs in *Gilbert*, Judge Gignoux stated (Addendum B, n.9, pp. 11-12):

> "A similar observation may be made with regard to the Commission guideline on pension or retirement plans at issue in this action, 29 C.F.R. § 1604.9(f). Issued in 1972, the guideline is hardly a coeval interpretation of Title VII, which Congress passed in 1964. Furthermore, the Commission guideline, contradicting as it does the Wage and Hour Administrator's regulation, 29 C.F.R. § 800.116(d), is a substantial departure from the previous guideline issued in 1965 in which the Commission stated it would defer to the Wage and Hour Administrator's interpretations on equal pay questions. 29 C.F.R. § 1604.7(b) (1965)."

A further and even more important reason for this Court's rejection of the EEOC guideline in *Gilbert* was that it "sharply conflicted with other indicia of the proper interpretation of the sex-discrimination provisions of Title VII." (429 U.S. at 143). The "other indicia" were found in the *same* legislative history of the Equal Pay Act and in the *same* regulation of the Wage and Hour Administrator that we have already discussed. Confirming that "be-

cause of this [Bennett] amendment, interpretations of section 6(d) of the Equal Pay Act are applicable to Title VII as well. . . ." (429 U.S. at 144), this Court quoted approvingly the regulation of the Wage and Hour Administrator discussed above (29 C.F.R. § 800.116(d) (1976)) and concluded that it was a proper interpretation of Title VII. *Gilbert* at 145.

Precisely the same rationale applies to the subject issue. Indeed, the regulation discussed in *Gilbert* as applying to pregnancy disability issues has an even clearer application to this case, involving as it does a plan "providing insurance or similar benefits to employees" (29 C.F.R. § 800.116(d) 1976)). Accordingly, the language of this Court (at 145) in dismissing the complaint in *Gilbert* applies *a fortiori* to this case:

> "The EEOC guideline of 1972, conflicting as it does with earlier pronouncements of that agency, and containing no suggestion that some new source of legislative history had been discovered in the intervening eight years, stands virtually alone. Contrary to it are the consistent interpretation of the Wage and Hour Administrator, and the quoted language of Senator Humphrey, the floor manager of Title VII in the Senate. They support what seems to us to be the 'plain meaning' of the language used by Congress when it enacted § 703(a)(1)."

In short, the Court below erred in refusing to follow the plain meaning of the Bennett Amendment and instead relying upon the 1972 EEOC guideline and an administrative decision of the EEOC relating thereto.

Conclusion

As shown, the majority of the court below erred in according substantial deference to a recent guideline of the EEOC. The majority was also incorrect in concluding that an "individualized" approach is required in an insurance context and in holding that it is therefore "discriminatory" in such a context to recognize the conceded differences in male-female longevity. Insurance, by its nature, involves groups and requires recognition of the differing risk characteristics thereof. It is only by recognizing such differences that equitable treatment can be accorded to all insureds and the financial integrity of insurance systems can be ensured. To the extent that the decision of the majority below requires otherwise, the decision should be reversed.

Dated: November 17, 1977

Respectfully submitted,

WILLIAM R. GLENDON
JAMES B. WEIDNER
JAMES W. PAUL
200 Park Avenue
New York, New York 10017

Attorneys for Teachers Insurance and Annuity Association of America and College Retirement Equities Fund.

ADDENDUM A

TABLE 1

Survival Experience of 100,000 Males and 100,000 Females Retiring at Age 65, Using 1951 Group Annuity Mortality Table

Age	Numbers of Males Surviving	Numbers of Females Surviving	Surviving Females as a Percentage of Surviving Males
65	100,000	100,000	—
70	85,812	91,913	107%
75	67,156	78,574	117
80	45,242	59,049	131
85	24,110	37,100	154
90	9,633	18,309	190
95	2,674	6,280	235

TABLE 2

Aggregate Deaths From 100,000 Retirements at 65 Using 1951 Group Annuity Mortality Table

MALE			FEMALE	
Aggregate Deaths From Age 65 to Date	Aggregate Deaths as Percentage of Initial Population at Age 65	Age	Aggregate Deaths From Age 65 to Date	Aggregate Deaths as Percentage of Initial Population at Age 65
2,442	2%	65	1,360	1%
17,561	18	70	10,210	10
37,036	37	75	24,908	25
59,268	59	80	45,329	45
79,431	79	85	67,067	67
92,299	92	90	84,700	85
98,043	98	95	95,236	95

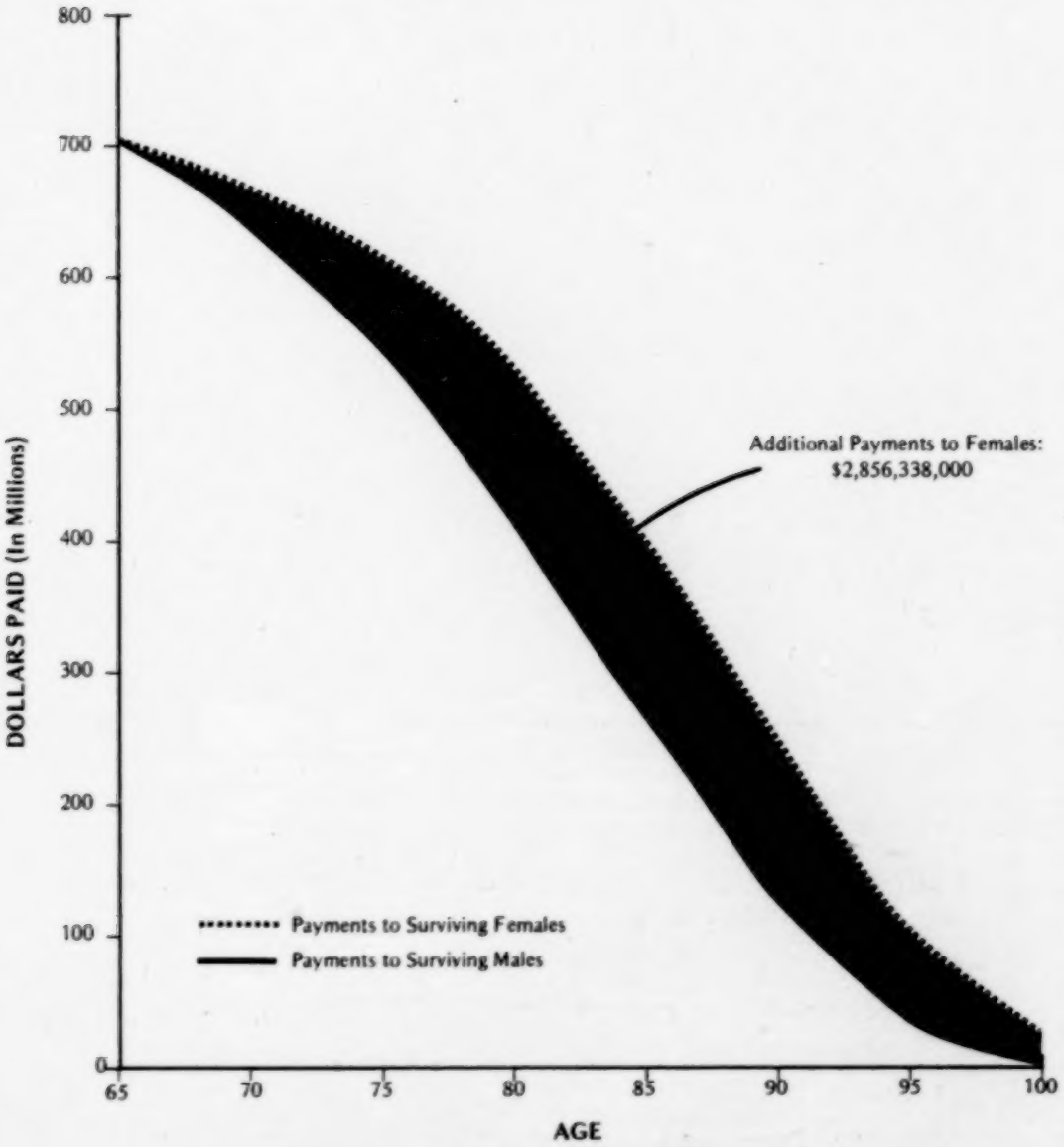
TABLE 3

Total Number of Years Lived by 100,000 Males and 100,000 Females Retiring at Age 65, Using 1951 Group Annuity Mortality Table

	MALES	FEMALES
Total Years Lived	1,470,820	1,759,639

TABLE 4

TOTAL ANNUNITY DOLLARS PAID TO SURVIVING MALES AND SURVIVING FEMALES EACH YEAR UNDER "UNISEX"*, APPLYING MORTALITY DATA IN USE BY TIAA-CREF UNTIL MARCH 1977**



* *100,000 males and 100,000 females retiring at age 65 electing single life annuities, assuming each male and each female would receive $7,000 per year.*

** *A-1974 (1, 2½) Annuity Table.*

ADDENDUM B

United States District Court

DISTRICT OF MAINE

SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff,* v. COLBY COLLEGE, TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND, *Defendants.*	CIVIL NO. 75-136-SD

OPINION AND ORDER OF THE COURT

GIGNOUX, J.

In this action plaintiff Equal Employment Opportunity Commission (hereinafter "the Commission") alleges that defendant Colby College (hereinafter "Colby") previously has and currently is engaged in unlawful employment practices in violation of § 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (hereinafter "Title VII"). Defendants Teachers Insurance and Annity Association (hereinafter "TIAA") and College Retirement Equities Fund (hereinafter "CREF") are named as parties having an interest in the outcome of the litigation pursuant to Fed. R. Civ. P. 19(a). Jurisdiction variously is asserted under 28 U.S.C. §§ 451, 1343(4) and 1345 and § 706(f)(1), (3), (g) of Title VII, 42

U.S.C. 2000e-5(f)(1), (3), (g).[1] In its Amended Complaint the Commission asserts that the periodic retirement annuity and insurance death benefits plans in which Colby and its eligible employees participate and which TIAA-CREF manage impermissibly distinguish between male and female employees on the basis of sex in the disbursement of unequal benefit payments. The Commission prays the Court to enjoin permanently Colby's allegedly discriminatory practices, to award appropriate back pay with interest to those individuals adversely affected by such practices, and to order Colby to institute affirmative action programs providing equal employment opportunities for females.

Presently before the Court pursuant to Fed. R. Civ. P. 56(b) is a motion by defendants Colby, TIAA, and CREF for summary judgment in their favor. The motion is restricted to the legal question of whether § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (hereinafter "the Bennett Amendment"), the Equal Pay Act, 29 U.S.C. § 206(d), the allegedly applicable regulation promulgated by the Wage and Hour Administrator under the Equal Pay Act, 29 C.F.R. § 800.116(d) (1976), and the recent decision of the United States Supreme Court in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), fully dispose of this action as a matter of law in favor of defendants. The issue thus presented has been fully briefed and argued. For the

[1]In addition to providing for the creation of the Commission, 42 U.S.C. § 2000e-4, Title VII empowers the Commission to bring a civil action in a United States District Court of appropriate venue against a party, other than a government, governmental agency, or political subdivision, allegedly in violation of Title VII once extrajudicial means of resolving the purported violation have failed. 42 U.S.C. § 2000e-5(f)(1)(3). Congress in 1972 amended Title VII so as to rescind a provision which formerly exempted the employment activities of nonreligious educational institutions from the scope of Title VII. Act of March 24, 1972, P.L. 92-261 § 3, 86 Stat. 103. Title VII now covers employment practices of nondenominational educational institutions. 42 U.S.C. §§ 2000e(b) and 2000e-1.

reasons set forth below, defendants' motion for summary judgment is granted.

I.

The essential facts are undisputed. Colby is a nondenominational, nonprofit, privately supported educational institution located in Waterville, Maine. TIAA is a nonprofit, legal reserve life insurance company. The Carnegie Foundation for the Advancement of Teaching established TIAA in 1918 to provide retirement and insurance plans for educational institutions and their staff members. Only colleges, universities, independent schools, and similar nonprofit institutions principally engaged in education or research are eligible to participate in TIAA programs. CREF is a not-for-profit corporation created in 1952 through a Special Act of the New York legislature to complement the activities of TIAA. McKinney's 1952 Session Laws, ch. 124. Participation in CREF programs is limited to the same categories of institutions as are eligible for TIAA plans. Some 2800 institutions participate in TIAA-CREF programs.

In 1935 Colby's Board of Trustees voted to enroll the college in a retirement plan managed by TIAA. Under the terms of the arrangement both Colby and its participating employees make contributions to the plan calculated as a percentage of the participant's salary. Colby in 1956 likewise joined TIAA's life insurance program. Similarly situated male and female employees enrolled in the retirement annuity and life insurance plans make precisely equal contributions to the plans, and Colby's contributions to the plans also are exactly equal for similarly situated employees, regardless of sex. The annuity plan permits enrollees at retirement to select one of several options for the repayment

of accumulated funds. The repayment procedures generally involve either periodic benefits for the lifetime of the annuitant alone or periodic benefits for the lifetime of two persons, typically the annuitant and his or her spouse. The life insurance plan provides for decreasing group term coverage for each enrollee to age 70. Thereafter, the annuity benefits are designed to provide the risk protection appropriate for advancing age. Hence, the intent of the insurance plan is to provide dependents of an insured with financial protection in the event of the insured's premature death, whereas the annuity payments are designed to provide the retiree with income for the duration of his or her life.

The aspect of the Colby programs which the Commission challenges is the manner of payment of periodic annuity and life insurance benefits. In calculating the disbursement of annuity and insurance funds, TIAA-CREF utilize two sets of life expectancy tables, one for men and another for women. Actuarial data which TIAA-CREF have compiled show that women enrolled in their annuity and insurance plans consistently enjoy a lower mortality rate than similarly situated males. For instance, TIAA-CREF mortality statistics reveal that at age 65 the life expectancy for male annuitants is 17 years while for female annuitants of the same age the figure is 21 years. Female annuitants at age 65, therefore, can expect to receive their annuity payments for an average of four years longer than their male counterparts. To account for this difference in longevity, the TIAA-CREF managed annuity fund pays women annuitants from Colby monthly benefits which are somewhat less than the monthly payments made to male annuitants. Underlying this practice is the essential proposition upon which the insurance industry operates that the fund from which annuities are paid should not be exhausted until the last annuitant covered by the fund dies. In similar fashion, the TIAA-CREF managed insurance plan pays to

male insureds lower death benefits than to similarly situated women. Because of the higher mortality rate for men, monies from the group term life insurance fund for males are expended at a faster rate than monies from the women's group fund.

The Commission agrees with defendants that because all similarly situated participants make equal contributions to the annuity and insurance funds, and because Colby pays exactly equal amounts into the funds on behalf of each similarly situated participant, all similarly situated annuitants or insureds receive coverage having the same present actuarial value. Where the Commission perceives a violation of Title VII is in the unequal rate at which the annuity and life insurance benefits are paid out. According to the Commission this rate differential simultaneously discriminates both against women with regard to annuity payments and against men with respect to death benefits.

II.

Section 703(a)(1) of Title VII provides in pertinent part that it shall be an unlawful employment practice for an employer

> to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin,

42 U.S.C. § 2000e-(a)(1).[2]

---

[2]Although § 703(a)(1) does not specifically refer to retirement plans, it is settled that retirement plans are a condition of employment and fall within the scope of Title VII. *Chastang* v. *Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976); *Peters* v. *Missouri-Pacific R.R.*, 483 F.2d 490 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973); *Rosen* v. *Public Service Electric and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973); *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

Enacted in 1963 and effective in 1964, the same year in which Congress passed Title VII, the Equal Pay Act provides in pertinent part that no employer shall discriminate

> between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex:

29 U.S.C. § 206(d)(1).[3]

Bennett Amendment, § 703(h) of Title VII, recites in pertinent part:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [the Equal Pay Act].

42 U.S.C. § 2000e-2(h).

Both the language of the Bennett Amendment and its legislative history disclose the plain intent of Congress to avoid subjecting employers to two conflicting standards, those of Title VII and those of the then recently enacted Equal Pay Act, and to provide that any possible conflict

[3]No party to this action disputes that defendants are subject to the terms of the Equal Pay Act.

between the requirements of Title VII and of the Equal Pay Act is to be resolved in favor of the Equal Pay Act. During the Congressional debates over the 1964 Civil Rights Bill, Senator Humphrey, the floor manager of Title VII, stated that the purpose of the Bennett Amendment was to make it "unmistakably clear" that "differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill if it becomes law." 110 Cong. Rec. 13663-13664 (1964). Likewise, Senator Bennett, sponsor of the Amendment, declared in explaining the proposal, "The purpose of my amendment is to provide that in the event of conflicts [between Title VII and the Equal Pay Act], the provisions of the Equal Pay Act shall not be nullified." 110 Cong. Rec. 13646 (1964).[4]

The Commission, in 1965, initially issued an interpretative guideline stating it would defer to the Equal Pay Act and the Wage and Hour Administrator's interpretations as applicable to Title VII.[5] In 1972, however, the Commis-

[4]The following year, in July 1965, Senator Bennett further expounded on the meaning of his Amendment: "Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." 111 Cong. Rec. 13359 (1965). *Cf. Schultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir), *cert. denied*, 398 U.S. 905 (1970) (The Equal Pay Act and Title VII are to be construed *in pari materia*) (dictum).

[5]The 1965 guideline contains the following language:

> (a) Title VII requires that its provisions be harmonized with the Equal Pay Act . . . in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. . . .
>
> (b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Depart-

sion issued a revised guideline, repealing its 1965 guideline, stating that the Commission no longer regarded itself as bound by Equal Pay Act interpretations.[6]

In 1965, the Wage and Hour Administrator issued a regulation interpreting the Equal Pay Act which specifically exempts from liability under the Act an annuity or insurance plan in which employer contributions to the plan are identical for all similarly situated employees even though the benefits which accrue under the plan may be greater for one sex than the other. The regulation, 29 C.F.R. § 800.116(d) (1976), reads in pertinent part:

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other.

The Wage and Hour Administrator's regulation thus specifically sanctions plans, such as the annuity and insurance plans at issue in the present case, which require equal con-

---

ment of Labor. . . . Relevant opinions of the Administrator interpreting "the equal pay for equal work standard" will also be adopted by the Commission.

(c) The Commission will consult with the Administrator before issuing an opinion on any matter covering both Title VII and the Equal Pay Act.

29 C.F.R. § 1604.7(a), (b), (c) (1965).

[6]The 1972 revised guideline reads in pertinent part as follows:

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII.

(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

29 C.F.R. § 1604.8(b), (c) (1976).

tributions for both men and women, even though the resulting periodic annuity benefits or death benefits may differ.[7]

In 1972 the Commission promulgated its revised guidelines on sex discrimination. 29 C.F.R. § 1604.1 *et seq.* (1976). In direct conflict with the interpretative regulation issued by the Wage and Hour Administrator under the Equal Pay Act, 29 C.F.R. § 800.116(d), the Commission's new guidelines make pension or insurance plans which differentiate in benefits violative of Title VII. The relevant guideline, 29 C.F.R. § 1604.9(f) (1976), states in pertinent part:

> (f) It shall be a unlawful employment practice for an employer to have a pension or retirement plan which

---

[7]The Wage and Hour Administrator in two Opinion Letters has reiterated the clear import of this regulation. A 1970 Opinion Letter responded to an inquiry concerning the applicability of the equal pay provisions to employer contributions on behalf of employees to pension or retirement plans. The Wage and Hour Administrator stated, "[W]here the employer's contributions to such a plan are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question may be greater for one sex than for the other." Wage and Hour Administrative Opinion Letter No. 1117 (W-1470), [1969-1973 Transfer Binder, Administrative Rulings] Lab. L. Rep. (CCH) ¶30,681 (August 25, 1970). Three years later the Administrator delivered a similar opinion in a situation bearing a striking parallel to the instant case. The question propounded to the Administrator was, "If an employer makes equal contributions to a retirement plan covering male and female employees but if, as a result of separate actuarial tables used by the plan's administrators, the female employees, other things being equal, receive smaller monthly retirement benefits, is the employer in violation of the equal pay provisions?" The Administrator replied by reaffirming its 1970 position: "In response to your initial question, our opinion letter of August 25, 1977 [W&H Opinion Letter No. 1117] sets forth our current position under the Equal Pay Act. We are cognizant of the recent amendments to the Civil Rights Act and the Guidelines issued by Equal Employment Opportunity Commission (EEOC) on pension benefits and we will continue to watch developments in this area. However, we do not anticipate any change in our position in the immediate future." Wage and Hour Administrative Opinion Letter, No. 1276 (WH-224), Lab. L. Rep. (CCH) ¶30,874 (April 26, 1973).

establishes different optional or compulsory retirement age based on sex, or which differentiates in benefits on the basis of sex.

Despite the deference to the Equal Pay Act and the Wage and Hour Administrator's interpretations of that Act as mandated by the Bennett Amendment, the Commission contends that its revised guideline appropriately interprets Title VII and is controlling on the question of whether the benefits plans presently at issue constitute an unlawful employment practice.

III.

The recent decision of the Supreme Court in *General Electric Co.* v. *Gilbert, supra,* controls this case and makes clear that the Wage and Hour Administrator's regulation interpreting the Equal Pay Act, 29 C.F.R. § 800.116(d), must take precedence over the Commission's conflicting interpretation of Title VII, 29 C.F.R. § 1604.9(f). The Supreme Court in *Gilbert* faced the question of whether the employee insurance plan maintained by General Electric Company violated Title VII because it excluded from its coverage disabilities arising from pregnancies. On the merits of the discrimination claim the Court found that the General Electric plan did not contravene the standards of Title VII. *Id.* at 133-40.

Particularly germane to the instant motion for summary judgment is the manner in which the *Gilbert* court treated inconsistent administrative interpretations concerning benefits for pregnancy related disabilities. A Commission guideline issued under Title VII required that such benefits be applied on the same terms and conditions as they are applied to other temporary disabilities. 29 C.F.R.

§ 1604.10(b). But the Wage and Hour Administrator's regulation promulgated under the Equal Pay Act, 29 C.F.R. § 800.116(d), relied upon both by defendant in *Gilbert* and by defendants in this action, permits disability plans in which the benefits may accrue unequally to similarly situated participants due to a participant's sex. The *Gilbert* opinion traced the legislative history of the Bennett Amendment, discussed *supra,* and its reference to the Equal Pay Act.[8] Speaking for the majority, Mr. Justice Rehnquist wrote: "Because of this [Bennett] amendment, interpretations of section 6(d) of the Equal Pay Act are applicable to Title VII as well . . . ." *Id.* at 144. The opinion went on to quote with favor the Wage and Hour Administrator's regulation, 29 C.F.R. § 800.116(d), and stated that this interpretation and the legislative history of Title VII support "what seems to us to be the 'plain meaning' of the language used by Congress" when it enacted Title VII. *Id.* at 145.[9] Accordingly, the Court held that the Wage and

---

[8]Specifically, the Court noted the remarks of Senator Humphrey, 110 Cong. Rec. 13663-13664 (1964).

[9]In considering the significance of the Commission guideline, the Supreme Court noted that Congress in enacting Title VII did not confer upon the Commission authority to promulgate rules and regulations pursuant to that title and observed that therefore the Commission guidelines are entitled to less deference than administrative regulations which Congress has declared to have the force of law. *Id.* at 141; *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 484 (1942). The *Gilbert* court applied to the Commission guideline in question the formula which the Court developed in *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944), for determining the effect to be given an administrative ruling. By the *Skidmore* test the Court found the Commission guideline wanting. It neither was a contemporaneous interpretation of the statute involved nor was it consistent with earlier Commission guidelines on the same topic. *General Electric Co.* v. *Gilbert, supra* at 142-43.

A similar observation may be made with regard to the Commission guideline on pension or retirement plans at issue in this action, 29 C.F.R. § 1604.9(f). Issued in 1972, the guideline is hardly a coeval interpretation of Title VII, which Congress passed in 1964. Further-

Hour regulation, rather than the Commission guideline, was, because of the Bennett Amendment, the controlling interpretation of Title VII.

The conclusion of the Supreme Court is manifest. With regard to the specific question of benefits and insurance plans, the Wage and Hour Administrator's regulation, 29 C.F.R. § 800.116(d), accurately reflects the provisions of the Equal Pay Act. Because of the Bennett Amendment, the Equal Pay Act and proper interpretations thereof are incorporated into Title VII, where the two statutes overlap. It is apparent both from the language of 29 C.F.R. § 800.116(d) and from the 1970 and 1973 Opinion Letters of the Wage and Hour Administrator, *see* note 7 *supra*, that the retirement and insurance programs which Colby sponsors and which TIAA-CREF manage do not run counter to the terms of the Equal Pay Act. Therefore, under the rationale of *Gilbert*, the plans do not violate Title VII.

Plaintiff seeks to avoid the impact of *Gilbert* by referring the Court to *Manhart* v. *City of Los Angeles*, 553 F.2d 581 (9th Cir. 1976) (hereinafter *"Manhart I"*), *rehearing denied*, 553 F.2d 592 (9th Cir. 1977) (hereinafter *"Manhart II"*), *cert. granted*, —— U.S. ——, 46 U.S.L.W. 3184 (U.S., October 3, 1977) (No. 76-1810). The Court finds *Manhart* unpersuasive. *Manhart* dealt with a problem akin to but distinguishable from the issue raised in the case at bar. The Department of Water and Power of the City of Los Angeles maintained a retirement plan which required women employees to contribute from their wages

---

more, the Commission guideline, contradicting as it does the Wage and Hour Administrator's regulation, 29 C.F.R. § 800.116(d), is a substantial departure from the previous guideline issued in 1965 in which the Commission stated it would defer to the Wage and Hour Administrator's interpretations on equal pay questions. 29 C.F.R. § 1604.7(b) (1965).

to the pension fund 15% more than similarly situated males because of the longer average life expectancy of women. The periodic monthly benefits paid to all similarly situated retirees, male and female, however, were identical. The first time it considered the issue a panel of the Court of Appeals for the Ninth Circuit found the program to be in violation of Title VII. *Manhart I*.

Shortly thereafter, the Supreme Court announced its decision in *General Electric Co.* v. *Gilbert*, *supra*. Defendant City of Los Angeles petitioned for rehearing in light of *Gilbert*, but a majority of the same panel of the Ninth Circuit, one judge dissenting, denied the request and held that *Gilbert* did not require a change in the Court of Appeal's initial judgment. *Manhart II*. In reaching its decision on the petition for rehearing, the panel majority distinguished *Manhart* from *Gilbert* on the ground that in *Manhart* the out-of-pocket cost of the plan to women was greater than the out-of-pocket cost to men solely because of the women's gender. *Gilbert* did not involve such a discrepancy in employee contributions. The *Manhart* majority found a qualitative distinction between a benefits program in which the direct cost to the participant varies on the basis of the participant's sex and one in which the benefits accrue differently to one group of enrollees than to another due to the sex of the particular class of enrollees. *Manhart II*, *supra* at 593.

Unlike the program in *Manhart*, defendants' retirement and insurance plans do not assess greater contributions against members of one sex than another. All similarly situated participants pay an equal percentage of their salaries into the annuity and insurance funds, and Colby's contribution is identical for each similarly situated participant. *Manhart*, moreover, did not involve a conflict between a Commission guideline and a regulation issued by

the Wage and Hour Administrator.[10] In the instant case, as was true in *Gilbert*, there exists such a conflict. As discussed above, the Supreme Court in *Gilbert* placed its imprimatur on precisely the same regulation of the Wage and Hour Administrator at issue in this action. *Manhart*, therefore, differs from the case at bar both factually and as a matter of law. To the extent that the panel majority in *Manhart II* diverges from this Court's construction of *Gilbert*, this Court must respectfully disagree.[11]

Defendants' motion for summary judgment is granted, and judgment will be entered dismissing the complaint.

IT IS SO ORDERED.

Dated at Portland, Maine, this 27th day of October 1977.

EDWARD T. GIGNOUX
United States District Judge

A TRUE COPY

ATTEST: ELIZABETH SAX, Clerk

By ELIZABETH SIMMONS
Deputy Clerk

---

[10]The Secretary of Labor, under whose authority the Wage and Hour Administrator serves, filed a brief as amicus curiae in *Manhart I* which emphasized that the Department of Labor has never approved of a practice requiring unequal employee contributions to a pension plan on the basis of sex. Amicus brief at 4, 6. The Secretary's brief painstakingly distinguished the benefits plan challenged in *Manhart* from the type of plan endorsed by the Wage and Hour Administrator in 29 C.F.R. § 800.116(d). Amicus brief at 12-14.

[11]Plaintiff also seeks support from an opinion of the Indiana Supreme Court in *Reilly* v. *Robertson*, ____ Ind. ____, 13 E.P.D. (CCH) ¶ 11,626 (Indiana Supreme Court, February 22, 1977). *Reilly* held that the use of separate mortality tables in computing retirement benefits for male and female public school teachers, which resulted in lower periodic payments to female retirees, violated Title VII. Although released after the Supreme Court issued *General Electric Co.* v. *Gilbert*, *Reilly* does not mention *Gilbert*, and its precedental value must be discounted accordingly.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES W. PAUL, being duly sworn deposes and says that he served the foregoing Brief upon the attorney for Petitioners herein, on November 17, 1977, by mailing three true and correct copies thereof, air mail postage prepaid to Burt Pines, Esq., City Attorney, 111 North Hope Street, P.O. Box 111, Los Angeles, California 90051, and upon the attorneys for Respondents, on November 17, 1977, by mailing three true and correct copies thereof, air mail postage prepaid to Robert M. Dohrmann, Esq., Schwartz, Steinsapir, Dohrmann & Krepack, Two Century Plaza, 2049 Century Park East, Los Angeles, California 90067.

/s/ JAMES W. PAUL
James W. Paul

Sworn to before me this
17th day of November, 1977.

.....
Notary Public

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1976
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER: MICHAEL GLAZER: HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELLL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE

W. BERNARD RICHLAND,
Corporation Counsel
of the City of New York,
Municipal Building,
New York, N.Y. 10007

L. KEVIN SHERIDAN,
ROBERT S. DEUTSCH,
of Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1976
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES, MEMERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN JR.: KATHERINE B. DUNLAP: BURTON J. GINDLER: MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE

Preliminary Statement

This brief is submitted by the City of New York as amicus curiae pursuant to Rule 42, subd. 4 of the Supreme Court Rules in support of the arguments advanced in this court by the petitioner.

Interest of the Amicus

Employees of the City of New York, the Board of Education of the City of New York and various other related entities are covered by five different statutorily created pension systems or plans. Each of these systems has features unique to itself, but uniformly each, like the pension plan in issue in this case, relies in part on sex differentiated actuarial tables in determining both the amount an employees must contribute to his or her pension plan and the benefits he or she will receive.

As of June 30, 1974, there were over 340,000 active members in these various pension systems and the systems were paying benefits to approximately 91,000 beneficiaries. See "Pensions: A Report of the Mayor's Advisory Board" (Richard R. Shinn, Chairman, April 1976) hereinafter "Shinn Report"), p. 39. The Shinn Report indicates that the cost to fund the City's pension obligations for the fiscal year commencing July 1, 1976 was at least 1.22 billion dollars, and perhaps as high as 1.428 billion dollars which figures constitute either 26.2% or 30.7% of the City's payroll (id., 13). An important element in funding these pension plans is the contributions made by the employees (id., 43). And, if such employees contributions should be ordered reduced by a court, the City would be required to make

up the difference necessary to fund the pension obligations, because under New York law (N.Y. Constitution, Art. V, §7) they are contractual obligations of the City and may not be reduced.

These various pensions systems have existed for many years and are funded based on widely accepted actuarial principles, including the recognized fact that women on the average outlive men. However, as occurred in the instant case, one of the City of New York's pension plans has recently been challenged as discriminatory against women employees based upon its reliance upon sex-differentiated actuarial tables in determining the contributions and benefits of men and women employees. Women in City Government United v. City of New York, S.D.N.Y., 75 Civ. 2868.

Should this court in the instant case adopt the view of the majority in the Court of Appeals for the Ninth Circuit, and should such holding control the determination of the suit presently pending against the City of New York, it is estimated that the City, already in dire financial straits, might be exposed to a possible liabililty in excess of 400 million dollars at an additional annual cost of 35 million dollars.*

Under these circumstances, we believe little more needs to be said as to the siginificance of this case to this amicus.

*These figures, which are tentative, but conservative, are based on estimates of required additional employer contributions and additional benefits to be paid present and future retirees.

ARGUMENT

We have read the petition for certiorari filed in this case and, based upon our examination of that document, feel confident that the petitioner's legal position, which we support, will be fully and forcefully presented to this court. Under such circumstances, we believe it would be an undue burden on this court for us to also brief the merits of this appeal. However, we would offer here some very brief observations which we believe are pertinent:

First, as compared to General Electric Co. v. Gilbert, 429 U.S. 125 (1976), this is an a fortiori case for reversal, for here, unlike in that case, there is no denial to women of any type of benefit. Quite the contrary, the public employer has endeavored to treat its employees of both

sexes entirely alike in terms of compensation--providing women employees the same overall economic benefits as are provided to men, but recognizing, as is indisputable, the fact that women as a group live longer than men.

Second, we submit that had Congress in enacting Title VII intended to render illegal this very common feature of pension plans, it would have stated so more directly. This is not discrimination in hiring or firing. Nor, we believe, does it constitute discrimination in compensation. The claim of discrimination here is most strained, and certainly is not the type of "discrimination" which was of concern to Congress when it enacted Title VII, a view reinforced both by the language of the "Bennett Amendment and by its legislative history.

Third, insofar as EEOC regulations and interpretations of Title VII are concerned, we would suggest that this court in General Electric Co. v. Gilbert, supra, was unnecessarily restrained in its treatment of EEOC in this context. See 429 U.S. 125, at 140-145. We do not presume to critize EEOC for this, but that agency has by its own actions deprived itself of any credibility as a source to be consulted in attempting to ascertain the intent of Congress. Instead, and this may be to the good, it has consistently adopted the posture of an advocate, serving what it views as its client classes and attempting to push Title VII to its utmost limits without regard to what may have in fact been the intent of Congress.

CONCLUSION

An affirmance here would have dire consequences for the City of New York and, we are sure, numerous other pension systems. If this result must obtain in order to effect the will of Congress, then this must, of course, be so. However, we submit, this was clearly not the will of Congress and this court should not strain to find such an "intent." Rather, it should hold that pensions plans such as that here in issue are entirely lawful.

November 17, 1977

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel of the
City of New York

L. KEVIN SHERIDAN,
ROBERT S. DEUTSCH,

of Counsel.

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, *et al.*,

Petitioners,

—v.—

MARIE MANHART, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN COUNCIL OF LIFE INSURANCE ON BEHALF OF PETITIONERS

EDWARD SILVER
LARRY M. LAVINSKY
STEPHEN E. TISMAN
300 Park Avenue
New York, New York 10022
Attorneys for the Amicus

Of Counsel:

PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022

WILLIAM B. HARMAN, JR.
Executive Vice President
American Council of Life Insurance
1850 K Street, N.W.
Washington, D.C. 20006

INDEX

PAGE

Authorities Cited ii

Interest of the Amicus 1

Summary of Argument 2

The Decision Below 4

ARGUMENT:

Distinctions Between Males and Females Based Upon Life Expectancy Are Not Sex-Based Distinctions 6

Title VII Does Not Prohibit Distinctions Between Male and Female Employees Based Upon Life Expectancy 12

A. Traditional Title VII Tests of Sex Discrimination Cannot Meaningfully Be Applied to Insurance and Pension Benefits 12

B. Title VII Does Not Prohibit Distinctions In Insurance and Pension Plans Between Males and Female Employees Based On Valid Actuarial Data 19

C. Differentials Based Upon Life Expectancy Are Permitted Under the Equal Pay Act and Therefore Do Not Violate Title VII 35

IMPLICATIONS OF THE DECISION BELOW 42

CONCLUSION 50

PAGE

Authorities Cited

Cases:

American Federation of Musicians v. *Wittstein*, 379 U.S. 171 (1964) 26

Cohen v. *Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1973), *rev'd on other grounds sub nom. Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974) 29

Commissioner of Internal Revenue v. *Standard Life & Accident Insurance Co.*, —— U.S. ——, 97 S. Ct. 2523 (1977) 2

Dennis v. *United States*, 339 U.S. 162 (1950) 50

Employers Mutual Liability Ins. Co. v. *Arrien*, 244 F. Supp. 110 (N.D.N.Y. 1965) 26

Equal Employment Opportunity Commission v. *Colby College*, Daily Lab Rep. (BNA) No. 212 (Nov. 2, 1977 at D-1) 37, 38

Espinoza v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973) 6, 25, 26, 34

Friedman v. *United States*, 374 F.2d 363 (8th Cir. 1967) 35

Geduldig v. *Aiello*, 417 U.S. 484 (1974) 7, 39, 40

General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) 2, 5, 6, 7, 8, 9, 10, 17, 22, 34, 37, 38, 39, 40, 45

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 5, 15, 16

Hecht v. *Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) 35

PAGE

Inland Steel Co. v. *NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) 39

Ithaca Trust Co. v. *United States*, 279 U.S. 151 (1929) 20

Kettell v. *Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972) 35

Liberty Mutual Insurance Co. v. *Wetzel*, 424 U.S. 737 (1976) 2

Manhart v. *City of Los Angeles, Dep't of Water and Power*, 553 F.2d 581 (9th Cir. 1976), *cert. granted*, 46 U.S.L.W. 3214 (U.S., Oct. 3, 1977) 4, 15, 16, 42

Manhart v. *City of Los Angeles, Dep't of Water and Power*, 387 F. Supp. 980 (C.D. Calif. 1975) 15, 18

Morton v. *Mancari*, 417 U.S. 535 (1974) 26

Morton v. *Ruiz*, 415 U.S. 199 (1974) 34

Ozawa v. *United States*, 260 U.S. 178 (1922) 35

Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) .. 15, 16, 18

Rafford v. *Randle Eastern Ambulance Service, Inc.*, 348 F. Supp. 316 (S.D. Fla. 1972) 29

Ranes v. *Office Employees International Union*, 317 F.2d 915 (7th Cir. 1963) 26

Rosenfeld v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971) 15, 16, 18

Schultz v. *Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970) 22

Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 34

Sprogis v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) 15, 16

PAGE

Toilet Goods Association v. *Finch*, 419 F.2d 21 (2d Cir. 1969) 35

United Housing Foundation, Inc. v. *Forman*, 421 U.S. 837 (1975) 34

Willingham v. *Macon Telegraph Publishing Co.*, 482 F.2d 535 (5th Cir. 1973) 15
Willingham v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (*en banc*) 6, 16, 23

Zachary v. *R.H. Macy & Co.*, 31 N.Y.2d 443 (1972) 35

Statutes:

Civil Rights Act of 1964, Title VII, 78 Stat. 253, *as amended by* the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e *et seq.* .....*passim*
Section 703(h), 42 U.S.C. §2000e-2(h) 5, 22, 23, 35, 36, 38
Section 716(a), 78 Stat. 266 30
Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* (Supp. V 1975) 24
Equal Pay Act, 29 U.S.C. §206 .....*passim*
Equal Pay Act, 29 U.S.C. §206(d) 35, 40
Int. Rev. Code of 1954 §72 24
Ala. Code tit. 51, §432 (1958) 24
Alaska Stat. §43.31.011 (1977) 24
Ariz. Rev. Stat., vol. 18, Table VIII, & Supp., Tables VIII-X (West 1956 & Supp. 1977) 26
Cal. Ins. Code §790.03 (West Supp. 1976) 29
Cal. Lab. Code §1432 (West Supp. 1977) 30
Cal. Rev. & T. Code §13953 (West Supp. 1976) 26
Del. Code tit. 30, §1326 (1974) 24
Del. Code tit. 19, §711(h) (1975) 30

PAGE

D.C. Code Ann. §35-715 29
Fla. Stat. Ann. §198.02 (West 1971) 24
Ga. Code Ann. §92-3401 (1974) 24
Ind. Code Ann. §6-4.1-1-5 (Burns 1976) 24
Iowa Code Ann. §450.51 (West 1971) 26
Iowa Code Ann. §601A.12 (West 1975) 29
Iowa Code Ann. vol. 58 (West Supp. 1977) [tables] 26
Me. Rev. Stat. tit. 5, §4573 (1973 Supp. Pamphlet) 30
Md. Ann. Code art. 81, §160 (Supp. 1976) 24
Mass. Ann. Laws ch. 65, §13 (Michie/Law Co-op Supp. 1976) 24
Mo. Ann. Stat. §296.020 (Vernon Supp. 1976) 29
Mont. Rev. Codes Ann. §64-328 (Supp. 1976) 30
Neb. Rev. Stat. §77-2008 (1976) 24
N.H. Rev. Stat. Ann. §86:11 (Supp. 1975) 24
N.M. Stat. Ann. §72-33-3 (Supp. 1975) 24
N.D. Cent. Code §31-08-05 (1976) 26
N.D. Cent. Code §57-37.1-03 (Supp. 1977) 24
Or. Rev. Stat. §118.150 (1975) 24
Or. Rev. Stat. §659.028 (1975) 29
Pa. Cons. Stat. tit. 43, §955 (Purdon Supp. 1977) 30
S.C. Code §12-15-40 (1976) 24
Tex. Tax Code tit. 20A, §14.08 (1971) 24
Utah Code Ann. §59-12A-3 (1977) 24
Vt. Stat. Ann. Tit. 32, §7442 (1971) 24
Wis. Stat. Ann. §72.28 (West 1972) 24

Standard Valuation Statutes:

Ala., Alaska, Ariz., Ark., Cal., Col., Conn., Del., D.C., Fla., Ga., Haw., Idaho, Ill., Ind., Iowa, Kan., Ky., La., Me., Md., Mass., Mich., Minn., Miss., Mo., Mont., Neb., Nev., N.H., N.J., N.M., N.Y., N.C., N.D., Ohio, Okla., Or., Pa., S.C., S.D., Tenn., Tex., Utah, Vt., Va., Wash., W.Va., Wis., Wyo. 27

PAGE

Non-forfeiture Statutes:

Ala., Alaska, Ariz., Ark., Cal., Col., Del., D.C., Fla., Ga., Haw., Idaho, Ill., Ind., Iowa, Kan., Ky., La., Me., Md., Mass., Mich., Minn., Miss., Mo., Mont., Neb., Nev., N.H., N.J., N.M., N.Y., N.C., N.D., Ohio, Okla., Pa., S.C., S.D., Tenn., Tex., Utah, Vt., Va., Wash., W.Va., Wis., Wyo. 28

Regulations:

29 C.F.R. §800.116(d) 31
29 C.F.R. §1604.8 36
29 C.F.R. §1604.9 34
41 C.F.R. §60-20.3(c) 31
45 C.F.R. §86.39 32
45 C.F.R. §86.56(b)(2) 32
30 Fed. Reg. 14928 36
37 Fed. Reg. 6835 ..... 34, 36
37 Fed. Reg. 6837 ..... 34, 36
38 Fed. Reg. 35336 32
38 Fed. Reg. 35337 32
38 Fed. Reg. 35338 32
39 Fed. Reg. 22237 32
40 Fed. Reg. 24135 32
40 Fed. Reg. 57980 24
Treas. Reg. §1.72-5 (1956) 24
Treas. Reg. §1.72-9 (1956) 24
Treas. Reg. 20.2031-10(f) (1970) 24

Miscellaneous:

109 Cong. Rec. 9205 (1963) 42
109 Cong. Rec. 9206 (1963) 41
109 Cong. Rec. 9217 (1963) 41
110 Cong. Rec. 2581 (1964) 23

PAGE

110 Cong. Rec. 2584 (1964) 23
110 Cong. Rec. 13663 (1964) 38
111 Cong. Rec. 13359 (1965) 35
EEOC General Counsel opinion letter (July 28, 1966), BNA F.E.P. Rep. 401:3011-12 33
Wage-Hour Administrator opinion letter No. 257 (May 27, 1964), CCH Wages & Hours ¶30,851 ..... 30, 31
Wage-Hour Administrator opinion letter No. 336 (Jan. 22, 1965), CCH Wages & Hours ¶30,945 31
Wage-Hour Administrator opinion letter No. 394 (Oct. 27, 1965), CCH Wages & Hours ¶30,996.22 31
Wage-Hour Administrator opinion letter No. 484 (Aug. 3, 1966), CCH Wages & Hours ¶30,997.26 31
Wage-Hour Administrator opinion letter No. 1117 (WH-70) (Aug. 25, 1970), CCH Wages & Hours ¶30,681 31
Wage-Hour Administrator opinion letter No. 1276 (WH-224) (Apr. 26, 1973), CCH Wages & Hours ¶30,874 31
American Council of Life Insurance, Life Insurance Fact Book 1977 ..... 17, 18
J. Athearn, Risk and Insurance (2d ed. 1969) 13
Bailey, Hutchison & Narber, *The Regulatory Challenge to Life Insurance Classification*, 25 Drake L. Rev. Ins. L. Ann. 779 (1976) 47
Cherry, 23 Transactions of the Society of Actuaries, "The 1971 Individual Annuity Mortality Table" 495-546 17
Daily Lab. Rep., No. 80 (Apr. 23, 1976) at A-12 43
Daily Lab. Rep., No. 122 (June 23, 1976) at E-3 47
E. Hicks, Accounting for the Cost of Pension Plans (1965) 19
King, *Men, Women and Life Annuities*, 43 J. Risk & Ins. 553 (1977) 47

PAGE

J. Magee, GENERAL INSURANCE (6th ed. 1961) 13
H. Moir, SOURCES AND CHARACTERISTICS OF THE PRINCIPAL MORTALITY TABLES (1919) 17
Myers, *Forum: Pension Benefits and Sex,* 9 CIVIL RIGHTS DIGEST 45 (1977) 47, 49
N.Y.S. Commission Against Discrimination, Interpretive Rulings, CCH EMPL. PRAC. GUIDE ¶26,053 (superseded) 30
N.Y.S. Insurance Dept., *Matter of Alleged Violations of Article IX-D of the Insurance Law;* Opinion and Report Pursuant to Section 278 of The Insurance Law at 3-4 (Jan. 28, 1975) 11
Oregon Attorney General, Opinion No. 6982 (May 23, 1973) 11
B. Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 1161-62 (1976) 16
P. Shepherd & A. Webster, SELECTION OF RISKS (1957) 44
TRANSACTIONS OF THE SOCIETY OF ACTUARIES, 1971 Reports of Mortality and Morbidity Experience, "Mortality Under Standard Ordinary Insurance Issues Between 1969 and 1970 Anniversaries" 17
TRANSACTIONS OF THE SOCIETY OF ACTUARIES, 1975 Reports of Mortality and Morbidity Experience, "Mortality Under Standard Ordinary Insurance Issues Between 1973 and 1974 Anniversaries" 17
United Nations, DEMOGRAPHIC YEARBOOK 1970 (1971) 17
2 U.S. Dep't of HEW, VITAL STATISTICS OF THE UNITED STATES, 1971 ..... 17, 18
U.S. EEOC 1st ANNUAL REPORT, H.R. Doc. No. 86, 90th Cong., 1st Sess. (1966) 32, 33
U.S. EEOC, FIRST ANNUAL DIGEST OF LEGAL INTERPRETATIONS, July 2, 1965 through July 1, 1966 ..... 34, 35
Wash. Attorney General, Opinion AGO 1973 No. 21 (Oct. 11, 1973) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, *et al.*,

Petitioners,

—v.—

MARIE MANHART, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN COUNCIL OF LIFE INSURANCE ON BEHALF OF PETITIONERS

Interest of the Amicus

The American Council of Life Insurance is a trade association consisting of 471 life insurance companies, including most of the major life insurers in the United States. Its members, collectively, have in force approximately 92% of the life insurance written in the United States, and hold 99% of the assets of insured pension plans.

Because of the nature of the business of its members, the Amicus is particularly qualified to offer to this Court its expertise in the significant actuarial and insurance-related issues which underlie this case, and to describe

the impact this Court's decision could have on the basic structure of the American life insurance industry.

The Amicus and one of its predecessors, the American Life Insurance Association, have participated in a number of insurance-related cases before this Court in recent years. *E.g., Liberty Mutual Insurance Co.* v. *Wetzel,* 424 U.S. 737 (1976); *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976); *Commissioner of Internal Revenue* v. *Standard Life & Accident Insurance Co.,* —— U.S. ——, 97 S. Ct. 2523 (1977).

SUMMARY OF ARGUMENT

This case poses a question of alleged sex discrimination under Title VII of the Civil Rights Act of 1964, which defies analysis in traditional terms. It presents the dilemma of reconciling traditional approaches to claims of discrimination, normally oriented toward individuals, with insurance concepts that, by definition, are founded upon group experience.

The conduct at issue—a requirement that female employees pay a greater amount than males for equal periodic pension benefit payments (and its correlative, the payment by an employer of unequal amounts to obtain such equal benefit payments) is, in an economic sense, wholly non-discriminatory; the difference in the total dollar value of the benefits received by female employees from that received by male employees justifies the difference in employee contributions. The distinction involved, while correlated with sex, is based upon a neutral factor: life expectancy. It is neither a baseless stereotype—sex-cor-

related differences in life expectancy have long been documented in the actuarial literature—nor is it based upon a preconception of the appropriate role of the female worker, which has the effect of impeding her entry into, and advancement within the work force.

While this lawsuit arises under Title VII, that statute, properly construed, does not require that real differentials in life expectancy be ignored in establishing contributions to pension plans. "Sex-segregated" actuarial tables are in widespread use both by government and private industry. They were in use as well at the time of the enactment of Title VII. To overturn these long-standing actuarial and insurance practices would incorrectly attribute to Congress an intention supported neither by logic nor by the meager legislative history of Title VII. By subordinating Title VII to the Equal Pay Act and interpretations under that statute, Congress made clear its intention to permit sex-related distinctions such as the one at issue in this case.

The majority decision below, if sustained by this Court, will have an impact far beyond merely preventing an employer from requiring unequal insurance contributions from his male and female employees. In the guise of an interpretation of an anti-discrimination statute, it could indirectly impose on the insurance industry a new federal actuarial rule requiring the utilization of "unisex" actuarial tables. This would seriously disrupt the life insurance and pension industry in the United States, potentially costing employers *billions* of dollars annually. It would raise difficult questions concerning annuities already purchased and pension and insurance plans already bargained for. Moreover, given the undeniable differential in male versus

female mortality, rates based upon "unisex" tables will be inherently unstable. In the case of annuities, the unisex rate will tend to rise to the level of the rate now charged for female employees; in the case of life insurance, the unisex rate will tend to rise to the level of the rate now charged for male employees. The net result may well be increased costs and a reduction in insurance coverage available for all employees.

THE DECISION BELOW

In its 2-1 decision, dated November 23, 1976, amended December 23, 1976 and May 5, 1977, the Ninth Circuit affirmed the granting of summary judgment to the plaintiffs (Respondents here). It approved the district court's ruling that the retirement plan of the City of Los Angeles Department of Water and Power (the "Department") violated Title VII of the Civil Rights Act of 1964[1] by requiring female employees to make larger contributions than male employees for their respective pension benefits.[2] The judgment enjoined the plan from requiring larger contributions from females, and ordered the plan to refund "excess contributions" collected on or after the date Title VII became applicable to municipal employers.[3]

Petitioners had claimed that while women were required to make larger pension contributions than men, this was

[1] 78 Stat. 253, *as amended by* the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§ 2000e *et seq.*

[2] *Manhart* v. *City of Los Angeles, Dep't of Water and Power*, 553 F.2d 581 (9th Cir. 1976), *cert. granted*, 46 U.S.L.W. 3214 (U.S. Oct. 3, 1977).

[3] Appendix at 134-35 (hereinafter "App. __").

a distinction based on longevity, not sex, and therefore did not violate Title VII. The Ninth Circuit held, however, that because the unequal pension contributions required of female employees were based upon the "average" experience of the group, rather than being measured individually, they were illegal. It relied upon the rule enunciated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 436 (1971) that employers were required "to make job-related decisions about each employee on the basis of relevant individual characteristics, so that the employee's membership in a racial, ethnic, religious, or sexual group is irrelevant to the decisions."[4] The Court of Appeals rejected petitioners' claim that the Bennett Amendment,[5] included in Title VII to prevent conflicts between that statute and the Equal Pay Act of 1963,[6] permitted the differential in contributions by employees. Moreover, it declined to defer to the interpretations of the Department of Labor Wage-Hour Administrator and followed, instead, EEOC guidelines similar to those rejected by this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976) (*"General Electric"*).

In response to a request for a rehearing or rehearing *en banc* in light of the decision in *General Electric*, the court adhered to its prior decision. Judge Kilkenny, based upon a careful analysis of the *General Electric* decision, dissented.

[4] 553 F.2d at 585.

[5] Civil Rights Act of 1964, Sec. 703(h), 42 U.S.C. § 2000e-2(h).

[6] 29 U.S.C. § 206.

ARGUMENT

DISTINCTIONS BETWEEN MALES AND FEMALES BASED UPON LIFE EXPECTANCY ARE NOT DISTINCTIONS ON ACCOUNT OF SEX

Respondents claimed, and the court below held, that the Department discriminated on the basis of sex by requiring female employees to make larger pension contributions than male employees, in order to obtain equal pension benefits. When employer pension contributions were considered, however, the fact is that the Department's female employees received *more* in additional employer contributions than the amount of the "excess" contributions they were required to make.[7] In any event, however, the threshold question to be resolved is whether a distinction between male and female employees based upon differences in anticipated life expectancy constitutes discrimination on account of sex.[8] We submit that the answer is "no".

This Court, in its decision in *General Electric,* has implicitly recognized that actuarially valid factors such as life expectancy can constitute a basis for differentiation be-

[7] The record showed that female employees contributed more than male employees, but that the Department's contributions per female employee likewise were larger than its contributions on account of a similarly situated male. The evidence further showed that the additional sum contributed by a female employee was *always* less than the amount by which the contribution of the Department for the female employee exceeded the contribution for a similarly situated male employee. (App. 86).

[8] *See General Electric,* at 136; *Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86, 95 (1973); *Willingham* v. *Macon Tel. Publishing Co.,* 507 F.2d 1084, 1088 (5th Cir. 1975) (*en banc*).

tween male and female employees, without constituting sex discrimination. There, the employer had been charged with sex discrimination for providing disability insurance coverage which excluded benefits for a specific risk: pregnancy. Despite the fact that this particular risk was correlated 100% with members of one sex, this Court held, in effect that the employer had made a lawful distinction on the basis of a cause of disability. It rejected the simplistic contention that this 100% correlation constituted sex discrimination, either on its face, or because of its "disparate effect" on women. Quoting from its decision in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), this Court noted:

> "'There is no evidence . . . that the selection of the risks insured by the program worked to discriminate against any definable group or class *in terms of the aggregate risk protection derived by that group or class from the program.* [*417 U.S.*] *at 496-497*'"[9] (emphasis supplied).

This Court then proceeded to examine the statistical and actuarial evidence in the record in *General Electric,* which demonstrated that, based upon its actual experience, the cost to General Electric of providing sickness and accident disability insurance was substantially greater, on the average, per female employee than per male employee. Accordingly, the majority opinion declared:[10]

[9] *General Electric,* at 135.

[10] *Id.* at 130-31, nn.9, 10. The lower court had expressly declined to find that "the present actuarial value of the coverage was equal as between men and women," (429 U.S. at 131) but stated that "even had it found economic equivalence, such a finding would not . . . have justified the exclusion of pregnancy related disabilities from an otherwise comprehensive . . . plan." (*Id.* at 130-31).

"Whatever the ultimate probative value of the evidence . . . on this subject . . . at the very least it tended to illustrate that the selection of risks covered by the Plan did not operate, in fact, to discriminate against women . . . . [W]e start from the indisputable baseline that '[t]he fiscal and actuarial benefits of the program . . . accrue to members of both sexes,' . . . .

• • •

The Plan, in effect . . . is nothing more than an insurance package, which covers some risks, but excludes others . . . .

• • •

As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme . . . ." (footnote omitted).[11]

Obviously, when this Court considered whether the insurance plan was "worth more to men than to women" it was not focusing upon any individual complainant.[12] Instead, its analysis focused upon the actuarial experience of the group, and the *value of the coverage to the average male or female employee*:

"Absent proof of different values, the cost to 'insure' against the risks is, in essence, nothing more than extra compensation to the employees, in the form of fringe

[11] *Id.* at 137-38.

[12] An eight-month pregnant female employee in obviously good health who would not receive coverage for her pregnancy and who was unlikely to require coverage for other causes of disability might indeed have found that the disability benefit coverage was "worth" less to her than to a man about to go into the hospital for a complicated operation.

benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the 'insurance,' *there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance,* due to the fact that her insurance had to cover the 'extra' disabilities due to pregnancy. While respondents seem to acknowledge that the failure to provide any benefit plan at all would not constitute sex-based discrimination in violation of Title VII, see n. 18, *infra,* they illogically also suggest that the present scheme does violate Title VII because 'a female must spend her own money to buy a personal disability policy covering pregnancy disability if she wants to be fully insured against a period of disability without income, whereas a male without extra expenditure is fully insured by GE against every period of disability.' Supplemental Brief for [Martha Gilbert et al.] on Reargument 11. Yet, in both cases—the instant case and the case where there is no disability coverage at all—the ultimate result is that a woman who wished to be fully insured would have to pay an incremental amount over her male counterpart due solely to the possibility of pregnancy-related disabilities. Title VII's proscription on discrimination does not require, in either case, the employer to pay that incremental amount. *The District Court was wrong in assuming, as it did, 375 F. Supp., at 383, that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required to be paid to one sex or the other because of*

their differing roles in 'the scheme of human existence.' "[13]

As will be discussed below,[14] the EEOC,[15] the Department of Labor and the Department of Health, Education and Welfare all have construed statutes or regulations prohibiting sex discrimination, to permit an employer to pay an equal amount on behalf of each male and female employee for fringe benefits, *even where that payment resulted in unequal* benefits being received by male and female employees.[16] This "equal payments" rule implicitly recognizes that, where the present value of the anticipated benefits to be received by members of one sex is equal to the present value of anticipated benefits to be received by similarly situated members of the other sex, no discrimination exists even though the periodic benefits to be received differ. These interpretations serve as an important indicator of the understandings of the agencies, and indeed, the federal government, as to the existence or non-existence of sex discrimination in the context of insurance and pension benefits.

Various state administrative agencies have likewise concluded that actuarial distinctions in insurance and pension

[13] *General Electric*, at 139 n.17 (emphasis supplied).

[14] *See infra* at 30-34.

[15] The EEOC subsequently repudiated its original position. *See infra* at 34.

[16] This principle has been applied in connection with life insurance benefits (where equal contributions will purchase a greater amount of life insurance coverage for a female than for a male, because of the longer female life expectancy), pension and annuity benefits (where the longer female life expectancy results in receipt of a lower periodic pension payment), and medical expense and disability insurance benefits (where the policy provided coverage for all causes of male disability, but excluded one cause of female disability—pregnancy).

plans do not constitute sex discrimination. For example, the Oregon Attorney General examined a state pension plan based upon sex-segregated actuarial tables and found it in compliance with state and federal law; the Washington State Attorney General ruled that insurers did not violate the state's anti-discrimination law by continuing to charge different premiums for males and females based upon life expectancy."

The New York State Superintendent of Insurance issued an opinion and report relating to whether underwriting practices which make distinctions based on the sex of the applicant or policyholder constitute unfair trade practices. The decision noted that, "[m]ore often than not, [sex-based] . . . underwriting distinctions emanate from unjustified subjective views of the role of women in our society," and ruled that "all underwriting distinctions based on sex . . . constitute an unfair trade practice under . . . [the New York] Insurance Law.[18] However, recognizing the validity of actuarial distinctions, the Superintendent expressly authorized "rate differentials . . . when supported by objective and valid statistical data."[19]

[17] Oregon Attorney General, Opinion No. 6982 (May 23, 1973); Wash. Attorney General, Opinion AGO 1973 No. 21 (Oct. 11, 1973).

[18] N.Y.S. Insurance Dep't, *Matter of Alleged Violations of Article IX-D of the Insurance Law*, OPINION AND REPORT PURSUANT TO SECTION 278 OF THE INSURANCE LAW at 3-4 (Jan. 28, 1975).

[19] *Id.* at 4, n.4. The decision went on to explain that the ban on underwriting distinctions based on sex:

> "does not mean that insurers cannot sell coverages that provide different but actuarially equivalent benefit levels for males and females *when a customer requires such coverage to avoid employment discrimination problems.*" (emphasis supplied) (*Id.* at 4, n.4).

Thus, this Court, as well as federal and state officials concerned with enforcement of anti-discrimination and insurance laws, have concluded that differences in insurable risks as between male and female employees, even though correlated with sex, stand as independent, lawful bases for distinguishing among employees.

TITLE VII DOES NOT PROHIBIT DISTINCTIONS BETWEEN MALE AND FEMALE EMPLOYEES BASED UPON LIFE EXPECTANCY

Even if a distinction between male and female employees on the basis of their respective life expectancies constitutes a gender-based distinction, we submit that this distinction does not constitute a discrimination on account of sex prohibited by Title VII. This follows from the inappropriateness of testing compliance of insurance and pension benefit programs against standards for determining the existence of sex discrimination which are oriented toward individuals, a lack of any legislative intent to reject the use of sex-segregated actuarial tables, and the controlling effect of the Equal Pay Act under which the use of such actuarial tables is permissible.

A. *Traditional Title VII Tests Of Sex Discrimination Cannot Meaningfully Be Applied To Valid Actuarial Distinctions In Insurance And Pension Benefits*

To understand the anomaly of attempting to apply traditional Title VII tests to insurance coverage offered employees as fringe benefits, requires an understanding of the nature and purposes of insurance.

Insurance serves two principal purposes:[20] (1) to reduce uncertainty as to the financial aspects of the risks[21] insured against, so that the insured, by paying a known premium can avert ultimate liability which he would face absent insurance against a given risk; and (2) to spread the economic burden of losses[22] among members of a group. The process by which these objectives are reached is the actuarial underwriting of the risk based upon experience, coupled with statistical assumptions as to such factors as interest rates applicable to monies paid in through insurance premiums. Those result in the computation of premium charges sufficient to fund anticipated losses, and pay such expenses as may be involved.[23]

Of course, if it were possible to know with certainty when a particular person will die, or will experience the particular loss insured against, then the insurer would simply charge premiums equal to the amount necessary to accumulate the policy benefit by the date of the loss. In short, insurance would be unnecessary since the insured could take the same amount of money and put it into savings.

Faced with an uncertain risk, the insured and the insurer are forced to make predictions as to when the loss will be experienced. However, because the insurer makes its predictions in gross, their positions differ significantly:

---

[20] *See* J. Athearn, RISK AND INSURANCE at 28 (2d ed. 1969); J. Magee, GENERAL INSURANCE 75-76 (6th ed. 1961).

[21] In insurance terms, a "risk" may be defined as the uncertainty of the happening of an unfavorable contingency. The term is also applied to the subject of the uncertainty (*i.e.*, to insure the life of a terminally ill person is a "bad risk"). *See* J. Magee, *supra* n.20, at 76-77; J. Athearn, *supra* n.20, ch. 1.

[22] A "loss" is the happening of the unfavorable contingency. J. Athearn, *supra* n.20, at 4.

[23] *See generally*, J. Athearn, *supra* n.20, chs. 1,2.

"The fundamental difference between the insurer and the insured is in predicting future events. So far as an individual insured is concerned, the insurer has no greater ability to predict than does the insured. The insurer, however, does not have to make the same prediction as the insured. The latter must predict what will happen to him as an individual. The insurer, on the other hand, makes predictions with regard to all insureds as a group. When a large number of risks is combined into a group, the risk faced by the insurer is not the same as that to which the insured is exposed nor is it merely the sum of the risks of all members of the group. The difference between the insurer which assumes a risk and the insured who transfers it lies in the fact that the former can make more accurate and reliable predictions with regard to its risk.

• • •

An insurer which assumes risks does so with the expectation of substituting average losses for actual losses, thus bringing certainty to insureds. Because the funds which are used to pay for losses suffered by insureds are typically collected from members of the group in advance, the insurer must be able to predict losses accurately. The fee (premium) charged for assuming a risk is based on such predictions and the predictions, in turn, are based on probability estimates." [24]

Thus, the fundamental principles of insurance are directed toward shifting economic risks of loss from an individual to a group. This was expressly recognized by the district court. It held, however, that since an individual

[24] J. Athearn, *supra* n.20, at 30-31.

female employee's contribution was linked to the "stereotyped" experience of an "average" woman, rather than that of the employee herself, the Department's pension plan violated Title VII."

The only case cited by the majority below in support of this proposition was *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 436 (1971). The District Court, in its decision granting plaintiffs' motion for a preliminary injunction, additionally had cited *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971); *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Sprogis* v. *United Air Lines Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); and *Willingham* v. *Macon Telegraph Publishing Co.*, 482 F.2d 535 (5th Cir. 1973).[25] The Court of Appeals candidly ad-

[25] The court below recognized the fundamental conflict presented by this case:

"The problem raised by this case is unique. There have been two basic policies which have guided the courts in prior Title VII litigation: (1) the policy against attributing general group characteristics to each individual member of the group, the major thrust of the statute, and (2) the policy allowing relevant employment factors to be considered in differentiating among individuals.

• • •

In the present case a relevant characteristic in determining how large an individual's retirement contribution should be is an informed prediction as to how long the person will live. But this characteristic, unlike those in the prior cases, is impossible to determine on an individual basis at the time when the contribution must be made. Thus, the policy of allowing relevant factors to be considered can be met only by allowing the group longevity statistics to be attributed to the individual members of the group. Yet this is exactly what the thrust of Title VII prohibits. We are therefore faced with the unique case in which the policy against per se discrimination directly conflicts with the policy of allowing relevant factors to be considered." (553 F.2d 581, 586).

[26] *Manhart* v. *City of Los Angeles, Dep't of Water and Power*, 387 F. Supp. 980, 983 (C.D. Cal. 1975).

mitted the inapplicability of cases such as *Rosenfeld*, *Sprogis* and *Phillips*:

> "An important basis of [the Ninth Circuit's decision in *Rosenfeld*] . . . was the fact that each individual applicant could actually be tested to see whether the relevant characteristic . . . was or was not in fact lacking.
>
> This same consideration has been present in [*inter alia*, the *Sprogis*, and *Phillips*][37] cases . . . ."[38]

The *Willingham* case was subsequently reversed *en banc*.[39] This Court's decision in *Griggs* indicated that the practices there challenged—requirement of a high school diploma, or a passing score on an intelligence test—were unacceptable because neither was "shown to bear a demonstrable relationship to successful performance of the jobs for which [they were] used."[40] As will be shown below,

---

[37] This Court's *per curiam* opinion in *Phillips* did not hold that the company's refusal to hire females with pre-school-age children necessarily violated Title VII; the Court stated that the existence of "conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under [the 'bona fide occupational qualification' exception to Title VII]", and remanded the case for further evidence. (*Phillips* v. *Martin Marietta Corp.*, *supra*, 400 U.S. at 544).

[38] 553 F.2d at 586.

[39] 507 F.2d 1084 (5th Cir. 1975).

[40] 401 U.S. at 431. Ironically, *Griggs*, cited by the majority for the principle that Title VII requires employers to treat employees on an individual basis, has emerged as the preeminent authority for the use of group statistics to establish a *prima facie* case of discrimination. *See* B. Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 1161-62 (1976).

Having approved the use of group statistics as a valid means of demonstrating the existence of discrimination against an individual, this Court is now being asked to condemn their use as evidence that no discrimination, in fact, exists.

the use of sex-segregated mortality tables is demonstrably related to prediction of male and female life expectancy.

Thus, none of the cases cited in support of the majority decision below presented the issue before this Court. The only decision which expressly considered the application of Title VII in an insurance/actuarial context was this Court's decision in *General Electric*.

Unlike the stereotypes, which have been condemned by the courts, the existence of the differential between male and female life expectancy[41] has not been questioned, nor has its statistical significance been challenged. Sex-segregated actuarial tables have been in use at least since 1843[42] and the difference has been corroborated in literally hundreds of tables compiled by government[43] and private industry.[44] In fact, recent evidence indicates that the disparity between male and female life expectancy is increasing; the disparity,

---

[41] According to data through 1975, female life expectancy at age 65, for example, is 4.3 years longer than male life expectancy. American Council of Life Insurance, LIFE INSURANCE FACT BOOK '77 at 92 (hereinafter "FACT BOOK").

[42] H. Moir, SOURCES AND CHARACTERISTICS OF THE PRINCIPAL MORTALITY TABLES 10, 14 (1919).

[43] *See, e.g.*, 2 U.S. Dep't of HEW, VITAL STATISTICS OF THE UNITED STATES, 1971, §5 at 5-3 to 5-10; United Nations, DEMOGRAPHIC YEARBOOK 1970 710-729 (1971).

[44] *See, e.g.*, FACT BOOK at 91-92; TRANSACTIONS OF THE SOCIETY OF ACTUARIES, *1975 Reports of Mortality and Morbidity Experience*, "Mortality Under Standard Ordinary Insurance Issues Between 1973 and 1974 Anniversaries", 1, 15-20; TRANSACTIONS OF THE SOCIETY OF ACTUARIES, *1971 Reports of Mortality and Morbidity Experience*, "Mortality Under Standard Ordinary Insurance Issues Between 1969 and 1970 Anniversaries", 18-22; Cherry, "The 1971 Individual Annuity Mortality Table", 23 TRANSACTIONS OF THE SOCIETY OF ACTUARIES 475-546.

which was 3.3 years at age 65 in 1965, had increased to 4.3 years, in 1975.[35]

Moreover, unlike role stereotypes such as those at issue in the *Phillips* v. *Martin Marietta Corp.* or *Rosenfeld* v. *Southern Pacific Co.* cases, where it was possible for an employer to evaluate individual female applicants to determine whether the stereotype characterization was valid, there is no way to determine the life expectancy of an individual, or to correct a mistake in predicting it.[36]

As will be described in the concluding point of this brief, the decision which this Court reaches as to the appropriate test to be applied under Title VII to insurance and pension benefits, will have an enormous impact on the employers, covered employees, and insurers of the United States. We submit that Title VII must be construed in a reasonable manner to accord with both economic and demographic reality. While the decision of the District Court stated that "stereotypic" distinctions based on sex, "whether rational or irrational,"[37] are condemned, this Court should construe Title VII to permit the rational; and not to require the irrational.

---

[35] 2 U.S. Dep't of HEW, VITAL STATISTICS OF THE UNITED STATES 1965, § 5 at 5-10; FACT BOOK at 92.

[36] While, theoretically, it would be possible to subject each applicant for an annuity to a rigorous physical examination and a detailed investigation of social habits and environmental factors, all of which would be relevant in predicting that applicant's life expectancy, this would refine the prediction, but would not convert the prediction into a certainty. The cost of such underwriting procedures would, moreover, make the insurance coverage prohibitively expensive.

[37] *Manhart* v. *City of Los Angeles, Dep't of Water and Power, supra,* 387 F. Supp. at 984.

B. *Title VII Does Not Prohibit Distinctions In Insurance And Pension Plans Between Male And Female Employees Based On Valid Differences In Life Expectancy*

Pension plans are customarily classified as either "defined benefit" or "defined payment" plans.[38] Under the former, the periodic benefit to be received by each employee, or the method of determining the benefit,[39] is specified in the pension plan (*e.g.,* $100 per month for life). Contributions are made by the employer and possibly the employee according to computations[40] designed to provide for the funding of the anticipated pension liability plus the attendant administrative and other costs. Under a "defined payment" plan, the employer pays a specified amount, and the periodic benefits payable to the employee upon retirement are based upon the amount of money accumulated to the time that benefits commence.[41]

Thus, in a defined payment plan, if a male and female employee, each age 35, work for 30 years before retirement, and have contributed on their behalf $1,000/year, at the date of retirement, each will have accumulated $30,000 plus earnings on that amount. If, according to the plan, this fund is converted into a life annuity upon retirement, the

---

[38] *See* E. Hicks, ACCOUNTING FOR THE COST OF PENSION PLANS at 142 (1965).

[39] The formulas often compute benefits according to an employee's length of service and salary prior to retirement.

[40] Such computations are predicated upon actuarial predictions as to matters such as the period over which the benefits will be paid (often the life of the insured or the insured and spouse) and the rate of return which can be earned on the premium contributions made.

[41] A variant of this is the "profit-sharing" plan where the amount paid in is computed according to a formula keyed to the employer's annual profits.

female employee would find that she would receive a monthly payment of approximately $622 while her male counterpart would receive approximately $730. At age 65 the life expectancy of females would be 19.2 years while the life expectancy of the male would in fact be 15.1 years.[42] The periodic payments received by female employees would be lower than those received by males, because the female employees would on the average, receive the payments over a longer period. In actuarial terms, however, the "value" of the benefits received by both male and female employees is the same.[43]

[42] This is only one of the various options which may be incorporated in any given plan. Some plans give the employee the right to take out, in a lump-sum payment, all or a portion of the accumulated fund. Other options which may be incorporated include annuities for a fixed period of time or annuities for the life of the employee and a survivor such as the spouse. Where a survivor option is elected, *i.e.*, the employee elects to take a reduced pension for the remainder of his or her life, with a periodic benefit to be paid to a designated survivor, a male employee suffers a greater reduction in the level of his periodic pension payments because of the higher likelihood that he will be survived by his spouse.

Inclusion of one or more options in the plan greatly complicates computation of the effect of a change in the basis for charging premiums since assumptions must be made as to which options may be selected by insureds at the time of their retirement.

Annuity figures are based on the 1971 Group Annuity Mortality Tables and six percent interest. The life expectancy figures are based on the same Mortality Tables.

[43] The concept of "value" in an actuarial sense was expressly considered by this Court in *Ithaca Trust Co.* v. *United States*, 279 U.S. 151 (1929). There, an estate attempted to deduct the value of property subject to a life estate of a widow. The issue presented was whether the "value" was that computed according to mortality tables "showing the probabilities on the day that the testator died" (279 U.S. at 155) or the value based upon actual circumstances—the widow had died within months of the death of the testator. Justice Holmes stated:

> "[T]he value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money it would bring in the market. Like all values, as the word is used by the law, it largely depends on more or less certain prophecies of the future; and the value is no less real at that time if later the prophecy turns out false than when it comes out true. Important as it is to correct certain improbabilities by the now certain fact, we are of opinion that it cannot be done, but that the value . . . must be estimated by the mortality tables." (citations omitted) (*Id*, at 155).

Conversely, under a defined benefit plan it is necessary for the employer to contribute a higher amount on behalf of a female employee, in order for a sufficient amount of money to have been accumulated to provide periodic payments equal to those of a similarly situated male employee. This is the inevitable consequence of the longer period during which it is anticipated that payments will be made to the female.

Obviously, under a simplistic analysis, either one of these types of plans could theoretically expose an employer to a claim of discrimination. Under the defined payment alternative, he would be providing a lower level of periodic benefit payments upon retirement to his female employees than to his male employees. Under the defined benefit approach, he would be contributing, in hard cash, more money on behalf of each female employee than each male employee.

In recognition of this, since 1964, the United States Department of Labor has consistently taken the position that, under the Equal Pay Act, an employer does not discriminate in providing fringe benefits to his employees where he complies with either the "equal payments" test, (*i.e.*, where an employer spends an equal amount for male and female employees to provide benefits, despite the fact that the periodic benefits purchased are unequal) or the "equal benefits" test (*i.e.*, where the periodic benefits provided to

male and female employees are identical, regardless of whether it costs more to purchase the benefits for members of one sex).

The rationale of this determination supports the practice challenged in the instant lawsuit, and, by reason of the Bennett Amendment,[44] stands as a bar to liability under Title VII. It is also persuasive evidence that Title VII, properly construed, does not prohibit the insurance and pension practices here at issue. The Equal Pay Act prohibits an employer to "discriminate . . . on the basis of sex"; similarly, Title VII forbids an employer from "discriminating against any individual . . . because of such individual's . . . sex . . . ."[45] As this Court noted in the *General Electric* case, the Department of Labor's interpretation comports both with "what seems . . . to be the 'plain meaning' of the language used by Congress when it enacted §703(a)(1)", and "what the concept of discrimination has traditionally meant . . . ."[46]

While the legislative history of the Title VII prohibition of sex discrimination has been characterized as "notable primarily for its brevity",[47] the same factor which this Court cited as significant in the *General Electric* decision—inclusion of the Bennett Amendment to require coordination of Title VII with the Equal Pay Act—indicates an intention to permit actuarial differentiations such as those involved in this case. *See* discussion, *infra,* at 35-42.

---

[44] Civil Rights Act of 1964, Sec. 703(h), 42 U.S.C. §2000e-2(h).

[45] The Courts have noted that the Equal Pay Act and Title VII are *in pari materia,* and therefore they should be construed consistently. *E.g., Shultz* v. *Wheaton Glass Co.,* 421 F.2d 259, 266 (3d Cir.), *cert. denied,* 398 U.S. 905 (1970).

[46] *General Electric,* at 145 (citations omitted).

[47] *General Electric,* at 143.

In addition to the Bennett Amendment, two other pieces of "formal" legislative history are of some relevance. Congresswoman St. George, in discussing the inclusion of sex as a protected classification within Title VII, declared that women neither sought nor needed "special privileges".[48] Furthermore, Congresswoman Green, in her remarks, made clear that no consideration had been given in committee to problems which might arise by reason of biological differences between men and women.[49] The failure to consider the impact of a generalized prohibition of sex discrimination upon insurance and pension plans, suggests that, in all likelihood, no sweeping change in practice was intended. *See Willingham* v. *Macon Telegraph Publishing Co., supra,* 507 F.2d at 1090.

Other than this limited legislative history, the only other available guideposts for determining the "legislative intent" underlying Title VII as applied to insurance and pension benefits, are the practices which prevailed throughout the government and the private sector both prior and subsequent to the enactment of Title VII.

The types of plans described above have been offered in the United States by employers and insurers since approximately 1875. The principles applicable to them have been widely understood.

The validity of using sex as a basis for the classification of risk has been recognized by the Federal Government and by almost every state.

Certain sections of the Internal Revenue Code and Treasury Regulations specifically prescribe the use of sex-segre-

---

[48] 110 Cong. Rec. 2581 (1964).

[49] 110 Cong. Rec. 2584 (1964).

gated actuarial tables. Regulations under Section 72 of the Internal Revenue Code,[50] for example, require the computation of "expected return" under annuity contracts based upon actuarial tables which are sex-segregated and involve a five-year differential between male and female life expectancy.[51]

Section 20.2031-10 of the Estate Tax Regulations[52] prescribes mortality tables differentiated on the basis of sex to be used in valuing non-commercial annuities, life interests and remainders. These tables have been incorporated by reference into the tax schemes of numerous states.[53]

The recently created Pension Benefit Guaranty Corporation created by the Employee Retirement Income Security Act of 1974[54] prescribes sex-segregated actuarial tables to be used in valuing plan benefits upon pension plan termination.[55]

These practices of the Federal Government stand as persuasive evidence that Congress could not have intended to

[50] INT. REV. CODE OF 1954, §72; Treas. Reg. §1.72-5 (1956).

[51] Treas. Reg. §1.72-9 (1956).

[52] Treas. Reg. §20-2031-10(f) (1970).

[53] Ala. Code tit. 51, §432 (1958); Alaska Stat. §43.31.011 (1977); Cal. Rev. & T. Code §13953 (West Supp. 1974); Del. Code tit. 30, §1326 (1974); Fla. Stat. Ann. §198.02 (West 1971); Ga. Code Ann. §92-3401 (1974); Ind. Code Ann. §6-4.1-1-5 (Burns 1976); Md. Ann. Code art. 81, §160 (Supp. 1976); Mass. Ann. Laws. ch. 65, §13 (Michie/Law Co-op Supp. 1976); Neb. Rev. Stat. §77-2008 (1976); N.H. Rev. Stat. Ann. §86:11 (Supp. 1975); N.M. Stat. Ann. §72-33-3 (Supp. 1975); N.D. Cent. Code §57-37.1-03 (Supp. 1977); Or. Rev. Stat. §118.150 (1975); S.C. Code §12-15-40 (1976); Tex. Tax Code tit. 20A, §14.08 (1971); Utah Code Ann. §59-12A-3 (1977); Vt. Stat. Ann. tit. 32, §7442 (1971); Wis. Stat. Ann. §72.28 (West 1972).

[54] 29 U.S.C. §1001 *et seq.* (Supp. V. 1975).

[55] 40 Fed. Reg. 57980-82 (1975).

reject the use of sex-segregated actuarial tables when it enacted Title VII.

In *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), this Court rejected an EEOC guideline under Title VII which purported to equate discrimination on account of citizenship with discrimination on account of national origin. Among the reasons for its decision was the fact that federal agencies themselves were utilizing the precise distinction which the EEOC sought to condemn:

> "Since 1914, the Federal Government itself, through Civil Service Commission regulations, has engaged in what amounts to discrimination against aliens by denying them the right to enter competitive examination for federal employment . . . . But it has never been suggested that the citizenship requirement for federal employment constitutes discrimination because of national origin, even though since 1943, various Executive Orders have expressly prohibited discrimination on the basis of national origin in Federal Government employment . . . .
>
> • • •
>
> Congress itself has on several occasions since 1964 enacted statutes barring aliens from federal employment. The Treasury, Postal Service, and General Government Appropriation Act, 1973, for example, provides that 'no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . unless such person (1) is a citizen of the United States . . . .'
>
> • • •

> To interpret the term 'national origin' to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy. This Court cannot lightly find such a breach of faith." [56]

See also Morton v. *Mancari*, 417 U.S. 535, 548-49 (1974).

Moreover, Congress must be presumed to have been aware of the practices of state governments and private industry when Title VII was enacted.[57] If it intended to effect a change in these policies, certainly it would have made its intention plain.[58] For example, state statutes in effect in 1964, expressly prescribed sex-segregated actuarial tables in Arizona;[59] provided for their use in the determination of value of future, contingent and limited estates in California;[60] in the valuation of annuities in Iowa;[61] and, as evidence of life expectancy in North Dakota.[62]

---

[56] 414 U.S. at 89-91 (citations omitted).

[57] *See, e.g., Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 90-91 (1973); *American Fed'n of Musicians* v. *Wittstein*, 379 U.S. 171 (1964); *Ranes* v. *Office Employees Int'l Union*, 317 F.2d 915, 917-18 (7th Cir. 1963). *See also Employers Mut. Liability Ins. Co.* v. *Arrien*, 244 F. Supp. 110, 114 (N.D.N.Y. 1965).

[58] *See Ranes* v. *Office Employees Int'l Union*, 317 F.2d 915, 917-18 (7th Cir. 1963). *See also* cases, *supra* n.57.

[59] Ariz. Rev. Stat., vol. 18, Table VIII, & Supp., Tables VIII-X, at 186-96 (West 1956 & Supp. 1977).

[60] Cal. Rev. & T. Code §13953 (West Supp. 1976).

[61] Iowa Code Ann. §450.51 (West 1971); Iowa Code Ann., vol. 58, at 287-92 (West Supp. 1977) [tables].

[62] N.D. Cent. Code §31-08-05 (1976).

Nor did the enactment of Title VII alter the perception of state governments as to the propriety of using sex-based actuarial tables. State statutes relating to the valuation by insurers of life insurance and annuity liabilities for the purpose of computing required reserves are virtually unanimous in permitting the value of policies issued on female lives to be calculated based upon the mortality experience of males three years *younger* (*i.e.*, a three-year "setback") than the insured females.[63]

---

[63] Ala. Code tit. 28A, §744 (Supp. 1973); Alaska Stat. §21.18.110 (1962); Ariz. Rev. Stat. §20-510 (1975); Ark. Stat. Ann. §66-2511 (1965); Cal. Ins. Code §§10485 and 10489.2 (West 1971); Col. Rev. Stat. §10-7-309 (1973); Conn. Gen. Stat. §38-130 (1975); Del. Code tit. 18, §§1112 and 1113 (1974); D.C. Code Encyel. §35-701 (West 1967); Fla. Stat. Ann. §625.121 (West 1972); Ga. Code Ann. §56-912 (1977); Haw. Rev. Stat. §431-269 (1968); Idaho Code §41-612 (1977) [6-year setback permitted]; Ill. Ann. Stat. ch. 73, §835 (Smith-Hurd 1965); Ind. Code Ann. §27-1-12-10 (Burns 1975); Iowa Code Ann. §508.36 (West Supp. 1977); Kan. Stat. §40-409 (1973); Ky. Rev. Stat. §304.6-140 (1970); La. Rev. Stat. tit. 22, §163 (West Supp. 1977); Me. Rev. Stat. tit. 24-A, §953 (1974); Md. Ann. Code art. 48A, §83 (1972); Mass. Ann. Laws ch. 175, §9 (Michie/Law Co-op 1977); Mich. Comp. Laws §500.834 (1970); Minn. Stat. Ann. §61A.25 (West 1968); Miss. Code Ann. §83-7-23 (1972); Mo. Ann. Stat. §376.380 (Vernon 1968); Neb. Rev. Stat. §44-404 (1974); Nev. Rev. Stat. §681B.120 (1973); N.H. Rev. Stat. Ann. §410.3 (1968); N.J. Stat. Ann. §17B:19-8 (West 1977); N.M. Stat. Ann. §58-7-5 (1962); N.Y. Ins. L. §205 (McKinney 1966 & Supp. 1976); N.C. Gen. Stat. §58-201.1 (1975); N.D. Cent. Code §26-10.1-02 (Supp. 1977) [6-year setback permitted]; Ohio Rev. Code Ann. §3903.36 (Page 1971); Okla. Stat. Ann. tit. 36, §1510 (West 1976); Or. Rev. Stat. §733.130 (1975); 40 Pa. Stat. Ann §71 (Purdon 1971); S.C. Code §38-7-90 (1976); S.D. Compiled Laws Ann. §58-26-22 (1967); Tenn. Code Ann. §56-115 (1968); Tex. Ins. Code art. 3.28 (Vernon 1963); Utah Code Ann. §31-22-14 (1974); Vt. Stat. Ann. tit. 8, §3784 (1970); Va. Code §38.1-456 (1976); Wash. Rev. Code §48.12.150 (1974); W. Va. Code §33-7-9 (1975); Wis. Stat. Ann. §206.201 (West Supp. 1977); Wyo. Stat. §26.1-104 (1957); *cf.* Mont. Rev. Codes Ann. §40-3011 (1961).

In 1977, Arkansas, Colorado, Illinois, Nevada, New Mexico, New York, Oregon, South Dakota, Texas, West Virginia, and Wisconsin

Similarly, state "non-forfeiture" statutes, used to compute paid-up non-forfeiture benefits and cash surrender values of policies where premium payments are in default, permit female mortality to be computed based upon a three-year setback from male experience.[44]

State insurance laws typically contain provisions prohibiting discrimination in rates between similarly situated

joined Idaho and North Dakota in amending their valuation statutes to permit a six-year setback. Similar amendments to their non-forfeiture statutes were enacted. *See infra* n.64.

[44] Ala. Code tit. 28A, §373 (Supp. 1973); Alaska Stat. §21.45.300 (1962); Ariz. Rev. Stat. §20-1231 (1975); Ark. Stat. Ann. §66-3327 (1965); Cal. Ins. Code §10163.5 (West 1971); Col. Rev. Stat. §10-7-309 (1973); Del. Code tit. 18, §2929 (1974); D.C. Code Encycl. §35-705b (West 1967); Fla. Stat. Ann. §627.476 (West 1972); Ga. Code Ann. §56-2504 (1977); Haw. Rev. Stat. §431-561 (1968); Idaho Code §41-1927 (1977) [6-year setback permitted]; Ill. Ann. Stat. ch. 73, §841.2 (Smith-Hurd 1965); Ind. Code Ann. §27-1-12-7 (Burns 1975); Iowa Code Ann. §508.37 (West Supp. 1977); Kan. Stat. §40-428 (1973); Ky. Rev. Stat. §304.15-340 (1970); La. Rev. Stat. tit. 22, §168 (West Supp. 1977); Me. Rev. Stat. tit. 24-A, §2532 (1974); Md. Ann. Code art. 48A, §414 (1972); Mass. Ann. Laws ch. 175, §144 (Michie/Law Co-op 1977); Mich. Comp. Laws §500.4060 (1970); Minn. Stat. Ann. §61A.24 (West 1968); Miss. Code Ann. §83-7-25 (1972); Mo. Ann. Stat. §376-670 (Vernon 1968); Mont. Rev. Codes Ann. §40-3831 (1961); Neb. Rev. Stat. §44-407.04 (1974); Nev. Rev. Stat. §688A.320 (1973); N.H. Rev. Stat. Ann. §409.5 (1968); N.J. Stat. Ann. §17B:25-19 (West 1977); N.M. Stat. Ann. §58-8-3 (1962); N.Y. Ins. L. §208-a (McKinney 1966 & Supp. 1976); N.C. Gen. Stat. §58-201.2 (1975); N.D. Cent. Code §26-03.2-05 [6-year setback permitted] (Supp. 1977); Ohio Rev. Code Ann. §3915.07 (Page 1971); Okla. Stat. Ann. tit. 36, §4029 (West 1976); 40 Pa. Stat. Ann. §510.1 (Purdon 1971); S.C. Code §38-7-90 (1976); S.D. Compiled Laws Ann. §58-15-38 (1967); Tenn. Code Ann. §56-1113 (1968); Tex. Ins. Code Art. 3.44 (Vernon 1963); Utah Code Ann. §31-22-13 (1974); Vt. Stat. Ann. tit. 8, §3747 (1970); Va. Code §38.1-465 (1976); Wash. Rev. Code §48.23.350 (1974); W. Va. Code §33-13-30 (1975); Wis. Stat. Ann. §206.181 (West Supp. 1977); Wyo. Stat. §26.1-364 (1957).

individuals.[45] Such laws have not, however, been construed to prohibit use of sex-segregated mortality tables; the differential in male-female life expectancy is considered to place males and females of the same age into different classes, justifying the imposition of different rates.

In addition to statutes which expressly permit or require the use of sex-segregated actuarial tables, various state fair employment laws make clear that actuarially based sex-distinctions in insurance retirement and pension plans do not contravene the states' policies to ban sex discrimination. For example, the California statute provides:

> "Nothing contained in this part relating to discrimination on account of sex . . . shall be deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided such terms or conditions are in accord-

[45] *See, e.g.*, CAL. INS. CODE §790.03 (West Supp. 1976); D.C. CODE ANN. §35-715 (1973). These statutes generally derive from the National Association of Insurance Commissioners Model Unfair Trade Practices Act which, *inter alia*, defines as an unfair trade practice and prohibits:

> "Making or permitting any unfair discrimination between individuals of the same class *and equal expectation of life* in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract." (1947 NAIC Proc. at 392-400) (emphasis added).

In effect, men and women of the same age are not similarly situated with respect to life expectancy. Thus, under the usual definition of discrimination—unequal treatment of similarly situated persons—no discrimination exists. *See Cohen* v. *Chesterfield County School Bd.*, 474 F.2d 395, 397-98 (4th Cir. 1973), *rev'd on other grounds sub nom., Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974); *Rafford* v. *Randle Eastern Ambulance Serv., Inc.*, 348 F. Supp. 316, 320 (S.D. Fla. 1972).

ance with customary and reasonable or actuarially sound underwriting practices." [66]

Finally, federal and state administrative agencies have been virtually unanimous in concluding that no sex discrimination exists where an employer complies with either the "equal payments" or "equal benefits" rule in providing insurance or pension benefits to employees.[67] The "equal payments" rule recognizes the actuarial fact that some fringe benefits cost more to provide to members of one sex, and therefore, an equal expenditure on behalf of males and females will purchase benefits having actuarially equal values, but resulting in differing levels of payments to male and female employees.

The "equal payments" formulation has been set forth in the Department of Labor Interpretive Bulletin under the

[66] Cal. Lab. Code §1432 (West Supp. 1977). *See also* Del. Code tit. 19, §711(h) (1975); Iowa Code Ann. §601A.12 (West 1975); Me. Rev. Stat. tit. 5, §4573 (1973 Supp. Pamphlet); Mo. Ann. Stat. §296.020(8) (Vernon Supp. 1976); Mont. Rev. Codes Ann. §64-328 (Supp. 1976); Or. Rev. Stat. §659.028 (1975); Pa. Cons. Stat. tit. 43, §955 (Purdon Supp. 1977).

In its August 21, 1968 interpretive rulings construing the New York State Fair Employment Practices Law, the State Commission Against Discrimination provided, *inter alia*:

"I. Insurance Coverage

a. In administering group life insurance, health insurance or other "fringe benefits", the employer may make distinctions between men and women workers to the extent that they are required by the underwriting policies of insurance carriers."

CCH Empl. Prac. Guide ¶26,053, at 8906 (superseded).

[67] The first articulation of this position by the Department of Labor Wage-Hour Administrator appears to have been in May of 1964, more than a year before July 2, 1965, the effective date of the employment provisions of Title VII. *See* Civil Rights Act of 1964, Sec. 716(a), 78 Stat. 266; Wage-Hour Administrator Opinion Letter No. 257, CCH Wages & Hours ¶30,851 (May 27, 1964).

Equal Pay Act,[68] and in a long series of opinion letters applicable to various forms of insurance[69] and pension benefits.[70]

The Department of Labor Office of Federal Contract Compliance[71] and the Department of Health, Education

[68] 29 C.F.R. §800.116(d) (1967):

"(d) *Contributions to employee benefit plans.* If Employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees."

[69] *E.g.*, Wage-Hour Administrator, Opinion Letter No. 257, CCH Wages & Hours ¶30,851 (May 27, 1964); Wage-Hour Administrator, Opinion Letter No. 336, CCH Wages & Hours ¶30,945 (Jan. 22, 1965); Wage-Hour Administrator Opinion Letter No. 394, CCH Wages & Hours ¶30,996.22 (Oct. 27, 1965); Wage-Hour Administrator, Opinion Letter No. 484, CCH Wages & Hours ¶30,997.26 (Aug. 3, 1966).

[70] *E.g.*, Wage-Hour Administrator, Opinion Letter No. 1117 (WH-70), CCH Wages & Hours ¶30,681 (Aug. 25, 1970); Wage-Hour Administrator, Opinion Letter No. 1276 (WH-224), CCH Wages & Hours ¶30,874 (April 26, 1973):

"Specifically you ask: 'If an employer makes equal contributions to a retirement plan covering male and female employees but if, as a result of separate actuarial tables used by the plan's administrators, the female employees, other things being equal, receive smaller monthly retirement benefits [from] the employer in violation of the equal pay provisions?'

. . . [O]ur opinion letter of August 25, 1970 [W & H Opinion Letter No. 1117], sets forth our current position under the Equal Pay Act. We are cognizant of the recent amendments to the Civil Rights Act and the Guidelines issued by Equal Employment Opportunity Commission (EEOC) on pension benefits and we will continue to watch developments in this area. However, we do not anticipate any change in our position in the immediate future."

[71] OFCC Guidelines, 41 C.F.R. §60-20.3(c) (1970). The OFCC considered adopting the EEOC's 1972 interpretation requiring the

and Welfare"[72] similarly concluded that no sex discrimination was involved where an employer made equal contributions on behalf of male and female employees, but the amount of fringe benefit payments received by the employee differed.

Indeed, the first time that the EEOC focused its attention upon the problem, it acknowledged the correctness of the Department of Labor's "equal payments/equal benefits" approach in determining the existence of sex discrimination. In its 1st Annual Report, EEOC stated:

> "The Commission determined that an employer does not commit an unlawful employment practice by contributing to or negotiating accident insurance programs which provide different benefits for male and female employees based upon reasonable actuarial considerations, as long as the cost to the employer is the same for both groups of employees. Similarly, no violation occurs when male and female employees receive the same benefits but the employer's contribution to the plan differs according to the sex of the employee.

payment of equal benefits to employees regardless of cost. *See* 38 Fed. Reg. 35336-38 (Dec. 27, 1973). To date, the OFCC has adhered to its original position.

[72] *See* Dep't of HEW Regulations, 45 C.F.R. §§86.39, 86.56(b)(2) (1976). The Department of HEW also considered changing its position to conform to the new EEOC position, but it also, to date, has not done so. *See* 40 Fed. Reg. 24135 (June 4, 1975).

The Department of HEW is the only agency to have expressly considered a "unisex" approach to computing contributions to be paid on behalf of male and female employees. 39 Fed. Reg. 22237 (1974). To date, HEW has not adopted such an approach.

> A related question is the difference in treatment between male and female employees under pension and retirement plans. Although a retirement program which requires female employees to retire at age 62 and male employees at age 65 would appear to violate Title VII, the Commission had not so ruled by June 30, 1966. The retirement plan problem is proving exceedingly complex, in large part because of the variety of methods in which pension plans are funded and the fact that, under plans in existence at the time Title VII was enacted, contractual rights have arisen which cannot be disturbed without producing inequitable results." U.S. EEOC, 1ST ANNUAL REPORT, H.R. Doc. No. 86, 90th Cong., 1st Sess. 41-42 (1966).

In a 1966 opinion letter, Charles T. Duncan, the General Counsel of the EEOC, stated:

> "The Commission . . . does not feel that an employer commits an unlawful employment practice by contributing to or negotiating insurance programs which provide different benefits for male and female employees based upon reasonable actuarial considerations required by insurance underwriters. Nor does the Commission believe that a violation of Title VII occurs when male and female employees receive the same benefits, but the employer's contributions to the plan differ, depending upon the sex of the employee. When employees receive the same benefits, but the employees' contributions to the plan differ depending upon the sex of the employee, no violation of Title VII occurs *if the differing employees' contributions are based upon reasonable actuarial grounds.*"[73]

[73] BNA F.E.P. Rep. 401:3011-12 (July 28, 1966) (emphasis added).

See also opinion letter, described in U.S. EEOC, FIRST ANNUAL DIGEST OF LEGAL INTERPRETATIONS, July 2, 1965 through July 1, 1966 at 22-23; U.S. EEOC, 1st ANNUAL REPORT, *supra* at 41-42.

This interpretation remained in effect until April 1972. In the same release in which it erroneously proclaimed illegal the denial of disability benefits on account of pregnancy, the EEOC repudiated its acceptance of the equal payments rule:

> "(e) It shall not be a defense under title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." [74]

This sudden about-face taken eight years after the adoption of Title VII is entitled to no deference by this Court.[75]

In sum, the widespread acceptance and use of sex-segregated actuarial data prior and subsequent to the enactment of Title VII, the uniform practice of federal agencies (including, until 1972, the EEOC) recognizing actuarial equality as precluding a finding of sex discrimination, and the available formal legislative history which in no way suggests an intention to work a major change on the insurance industry,[76] all lead to the inescapable conclusion that Title

[74] 29 C.F.R. §1604.9, 37 Fed. Reg. 6835, 6837 (April 4, 1972).

[75] *See General Electric*, at 140-43; *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858-59 n.25 (1975); *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974); *Espinoza* v. *Farah Mfg. Co., supra*, 414 U.S. 86, 92-96 (1973); *Skidmore* v. *Swift Co.*, 323 U.S. 134, 140 (1944).

[76] Of course, had Congress intended to work a substantial change in prevailing pension and insurance practices, it would have required little effort to insert into the statute, or the legislative history, some tangible evidence of this intent. *See Ozawa* v. *United States*, 260 U.S. 178, 192-94 (1922); *Toilet Goods Ass'n* v. *Finch*, 419 F.2d 21, 27 (2d Cir. 1969); *Friedman* v. *United States*, 374 F.2d 363, 366-67 (8th Cir. 1967); *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931, 945 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Kettell* v. *Johnson & Johnson*, 337 F. Supp. 892, 895 (E.D. Ark. 1972); *Zachary* v. *R. H. Macy & Co.*, 31 N.Y.2d 443, 460 (1972).

VII, properly construed, does not require that actuarial distinctions between males and females be ignored.

C. *Differentials Based Upon Life Expectancy Are Permitted Under The Equal Pay Act And Therefore Do Not Violate Title VII*

Because it feared conflicting interpretations under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, Congress enacted, as part of the latter statute, Section 703(h), the Bennett Amendment:[77]

> "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

The intention of this amendment is clear: "Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." [78]

Originally, the EEOC recognized the primacy of interpretations under the Equal Pay Act in the area of the De-

[77] 42 U.S.C. §2000e-2(h).

[78] 111 Cong. Rec. 13359 (1965) (remarks of Senator Bennett).

partment of Labor's competence. Its 1965 Guidelines provided, in pertinent part:

> "§1604.7 Relationship of Title VII to the Equal Pay Act.
>
> (a) Title VII requires that its provisions be harmonized with the Equal Pay Act in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII." [79]

This remained the stated position of the EEOC for six and one-half years until it was modified in the 1972 Guidelines[80]

[79] 30 Fed. Reg. 14928 (December 2, 1965) (citation omitted) (superseded).

The Department of Labor had no trouble construing the plain language of the Bennett Amendment to mean that in the area of sex discrimination in pay its interpretations were to control in applying Title VII. In Wage-Hour Opinion WH-140, July 1, 1971, the Wage-Hour Deputy Administrator stated, in part:

> "This is in further reference to your letter . . . concerning the application of the Civil Rights Act to a proposed insurance program.
>
> • • •
>
> . . . Title VII is administered by the Equal Employment Opportunity Commission, not the Department of Labor. However, the Equal Pay Act of 1963 . . . applies to fringe benefits which are deemed to be remuneration for employment where the Act's standards otherwise apply and, since Title VII of the Civil Rights Act of 1964 requires that relevant opinions of the Administrator of the Wage and Hour Division in the Department of Labor are to be adopted by the Commission in the making of interpretations under Title VII, we believe we can be of assistance to you." (Wage-Hour Opinion, WH-140, July 1, 1971, BNA Wage & Hour Man. 95:657).

[80] 29 C.F.R. §1604.8, 37 Fed. Reg. 6835, 6837 (April 5, 1972).

in which the EEOC also reversed its position on "the equal benefits/equal payments" rule, and on the appropriate treatment of disability on account of pregnancy. As this Court recognized in *General Electric,* notwithstanding the protestations of the EEOC, pay practices which are proper under the Equal Pay Act are not actionable under Title VII.[81]

As discussed, *supra,* at 30-31, the position taken by the Department of Labor Wage-Hour Administrator demonstrates that under the Equal Pay Act, and therefore under Title VII, an actuarially established differential would not offend either of the two statutes, where the employer complies with the equal payments test.

The applicability of the Wage-Hour Administrator's interpretation to claims of sex discrimination in pension benefits was only recently upheld by Judge Gignoux in *EEOC* v. *Colby College.*[82] There, the EEOC challenged Colby College's annuity and life insurance programs, claiming they violated Title VII, since the dollar amount of periodic annuity payments was calculated on the basis of sex-segregated mortality tables. As a result, the female

[81] *General Electric,* at 143-44.

[82] BNA Daily Lab. Rep., No. 212, Nov. 2, 1977 at D-1 (D. Maine, Oct. 27, 1977). The pension and insurance program of Colby College was funded through Teachers Insurance and Annuity Association and College Retirement Equities Fund, and provided for contributions to the fund based upon the salary of the participating employee. Similarly situated male and female employees enrolled in the retirement annuity and life insurance plans each made equal contributions, and the school's contributions on account of similarly situated male and female employees were the same. (*Id.* at D-1 to D-2). Under the annuity plan, the employee, at retirement, could select various options (usually, periodic payments for the lifetime of the insured, or for the lifetime of two persons such as the insured and spouse).

annuitants received lower periodic benefits than did the male annuitants. In the case of the life insurance plan, the effect was reversed; male insureds received lower death benefits than similarly situated females because of the higher male mortality rate. The EEOC disregarded the fact that similarly situated male and female employees covered by the annuity and life insurance plans received coverage having the identical present actuarial value.

The court examined the Bennett Amendment and its legislative history and found they manifested "the plain intent of Congress to avoid subjecting employers to two conflicting standards . . . and to provide that any possible conflict between the requirements of Title VII and the Equal Pay Act is to be resolved in favor of the Equal Pay Act."[33] The court noted that the EEOC initially acknowledged that it was required to adhere to interpretations under the Equal Pay Act, and, as this Court did in *General Electric*, Judge Gignoux rejected the EEOC's later attempt to disavow its earlier position. Similarly, the Wage-Hour Administrator's "equal payment/equal benefit" formulation, initially adopted by the EEOC, was held to be controlling, warranting summary judgment for the defendants."[34]

[33] *EEOC* v. *Colby College*, *supra* n.82, at D-2. The court also cited the statement of Senator Humphrey, quoted by this Court in the *General Electric* decision, that the purpose of the Bennett Amendment was to make it "unmistakably clear" that "differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill if it becomes law[.]" (110 Cong. Rec. 13663-64 (1964)).

[34] While the court distinguished the instant case, it expressly declined to follow the holding of the Ninth Circuit majority to the extent that it had "found a qualitative distinction between a benefits program in which the direct cost to participant varies on the basis of the participant's sex and one in which the benefits accrue differently to one group of enrollees to another due to the sex of the particular enrollees." (*EEOC* v. *Colby College*, *supra* n.82, at D-4).

Here, the Department of Labor, in its brief to the court below, argued that, while an employer may lawfully make unequal contributions for employees in order to provide equal benefits, or equal contributions, which result in unequal benefits, the employer runs afoul of the Equal Pay Act by requiring *employees* to make unequal contributions to obtain equal benefits. The illogic of this distinction becomes clear from the following hypothetical example: Under the equal payments rule, if the employer had purchased $10 worth of annuity benefits for male and female employees, he would not be guilty of sex discrimination even though the periodic payment to be received by a female employee upon retirement would be somewhat less than that payable to a male. In order for a female employee to obtain additional coverage to bring the level of her periodic payments up to the level of male employees, she would have to pay an insurer an incremental amount to purchase the additional coverage. If, instead, the employer collected from the female employee a payment representing a part of this difference and himself paid the balance, he would, under the Labor Department's theory, be exposed to liability for sex discrimination in pay. This, we submit, makes no sense.

Since it has been consistently held that payments by an employer for fringe benefits constitute wages,[35] the fact of discrimination in the payment of wages cannot logically depend upon whether the employer hands the money involved to the employee or to an insurer, or indeed pays it directly into his own pension benefit plan.[36]

[35] *See, e.g.*, *Inland Steel Co.* v. *NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

[36] As this Court noted in the *Geduldig* and *General Electric* cases, there is no operative distinction, under Title VII or the

It follows, both from the Department of Labor equal payments/equal benefits rule[87] and from the statutory exception discussed below, that actuarially based distinctions incorporated by employers into their pension plans do not involve sex discrimination under either the Equal Pay Act or Title VII.

The Equal Pay Act enumerates four specific exceptions. The last, Section 206(d)(1)(iv), is pertinent here:

> "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages . . . at a rate less than the rate to which he pays wages to the opposite sex . . . for equal work on jobs, the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions except where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex . . . ."

Clearly, if the fourth exception were intended to refer only to factors neither correlated with nor based upon sex, it would be meaningless; the statute would, by its terms not apply in the first place. The legislative history of this provision, however, makes clear that it was intended to be applied to authorize differentials based upon objective factors which happen to correlate with sex.

Equal Protection clause between the purchase of insurance from an outside party, or self-insurance, in determining the existence of sex discrimination. *General Electric*, at 138 n.16; *Geduldig* v. *Aiello*, *supra*, 417 U.S. at 492.

[87] The validity of the Department of Labor equal benefits/equal payments rule derives either from the exception to the Equal Pay Act discussed below, or from the fact that the rule does not involve a sex distinction at all. *See* discussion *supra* at 6-12. In either case there would be no liability under Title VII.

During the course of the debates over the Equal Pay Act, Representative Findley of Illinois introduced an amendment which expressly would have allowed wage differentials based on the difference in cost associated with the employment of members of different sexes.[88] Congressman Goodell, one of the sponsors of the bill, spoke of the effect of the bill even absent the proposed amendment:

> " . . . there are many factors that can be taken into consideration in working out differentials of pay among employees . . . which would be proper under this legislation so long as they were based on those factors and not on the basis of whether employees are women or men."[89]

One such factor specifically mentioned was " . . . differentials in pay relating to insurance costs . . . ."[90]

Representative Thompson, the Chairman of the committee which reported on the Equal Pay Act, observed that: " . . . the language the gentlemen would add is redundant."[91]

Representative Pucinski asked whether the language referring to " 'a differential based on any other factor than sex' [would] really cover what the gentlemen from Illinois is trying to do?"[92]

Representative Thompson agreed it did[93] and thus, the Findley Amendment was rejected.

---

[88] 109 Cong. Rec. 9217 (1963).

[89] 109 Cong. Rec. 9206 (1963).

[90] *Id.*

[91] 109 Cong. Rec. 9217 (1963).

[92] *Id.*

[93] *Id.*

It is clear, therefore, that the fourth exception enumerated in the Equal Pay Act was not intended to be a mere redundancy. It was designed to make clear that neutral factors such as working time where statutes limited the number of hours a woman could work,[94] or life expectancy, even though linked with gender, were intended to be permitted under the Act.

Thus, regardless of whether the plan here at issue falls within the precise bounds of the equal payments rule as currently articulated by the Department of Labor, it is rooted in precisely the same actuarial approach which provides the legal and logical underpinning for that interpretation. As the dissenting opinion below noted, the Department of Labor "contemplate[d] the actuarial equivalent of the [petitioner's pension] scheme".[95]

IMPLICATIONS OF THE DECISION BELOW

The decision below, requiring that equal periodic pension benefits be given to male and female employees, will require radical changes in the pension and retirement coverage available to American workers, and may substantially increase pension costs.

In order to provide equal benefits, an employer with a defined payments plan presently in effect, will be faced with

[94] 109 Cong. Rec. 9205-06 (1963) (remarks of Representative Griffin).

[95] 553 F.2d at 597. Judge Kilkenny continued:

"In the context of pension plans, [the equal payments] rule makes sense only if it is read to impliedly authorize the funding of employee pension plans upon the basis of separate mortality tables. This regulatory justification for a plan with equal contributions and unequal benefits cannot be ignored in the variation before us." (*Id.*)

two choices: either to increase the amount of dollars contributed on behalf of female employees in order to fund the additional benefit payments, accumulating the funds in a "side pool" ("topping-up"); or to compute benefits on a "unisex" basis (*i.e.*, by reference to a mortality table based upon combined male and female experience).

The topping-up approach creates two problems. The first is the obvious fact that it requires that an employer pay an additional amount on behalf of female employees, thereby increasing the wages of the female employee above that of a similarly situated male. This would substantially add to the cost of pension coverage; on a nationwide basis, the additional costs have been estimated at $1.8 *billion* annually.[96]

Second, it would be necessary, under an equal benefits rule, to restructure the great majority of existing pension plans. Most plans offer various benefit options upon retirement in addition to a life annuity. If male and female employees must, for example, each receive equal amounts under a lump-sum option, then no female employee would ever select the lump-sum option unless the benefits payable under that option were also computed by

[96] In April 1976, the Federal Equal Employment Opportunity Coordinating Council formulated a proposal to require that equal pension benefits be paid to all female employees retiring after January 1, 1980. *See* BNA Daily Lab. Rep., No. 80, April 23, 1976 at A-12; *Id.*, No. 122, June 23, 1976 at A-16 to 17, E-1 to 3. In connection with this proposed bill, the Coordinating Council received a report by a task force of actuaries on the cost of equalizing pensions for men and women. Based upon actual payments into pension plans in 1976 in the aggregate amount of $60 billion and assuming a 3% increase (the figure apparently believed by the government to be the average cost to pension plan sponsors), this would result in additional pension costs of approximately $1.8 billion annually.

using female mortality rates. The added costs of providing the same benefits for male employeees would constitute a disincentive to employers in determining whether to establish or maintain pension coverage for their employees.

The alternative approach to "topping-up", computation of funding requirements based upon unisex actuarial tables, is no more satisfactory a solution. For existing plans this alternative would, of course, result in a reduction in benefits for males, which is not a practical solution for most employers, particularly where benefits have already vested or are collectively bargained.

Certain commentators have suggested that the use of unisex actuarial tables would satisfy both the requirements of Title VII and the actuarial necessity of a group basis for computing the level of required premiums. In fact, such tables violate the basic insurance concept that,

> "every insured should contribute his fair share toward the risk involved—that only applicants who are exposed to comparable degrees of risk should be placed in the same premium class." [97]

Equitable classification of risks requires not only that equal classes be treated equally, but also that unequal classes *not* be treated equally. Just as it would be inequitable to treat a 25-year old woman as a member of the same risk class as a 65-year old woman to compute life insurance or annuity premiums, similarly, a 25-year old male employee is in a different risk class than a 25-year old female. If this principle is not followed, then one class

[97] P. Shepherd & A. Webster, SELECTION OF RISKS 1 (1957). This principle is embodied in state insurance statutes. *See supra* n.65 and accompanying text.

will be forced to subsidize another. Use of unisex tables serves only to camouflage, not to eliminate, the subsidization.

To say that rates must be computed based upon combined male and female experience and that for male employees must pay additional insurance premiums for their pensions is analogous to the claim which was raised by the plaintiffs and rejected by this Court in *General Electric.* The district court there had found that, even if it were demonstrated that the actuarial value of the disability insurance coverage provided to male and female employees was identical,

> "such a finding would not . . . have justified the exclusion of pregnancy-related disabilities . . . . Regardless of whether the cost of including such benefits might make the Plan more costly for women than for men, the District Court determined that '[i]f Title VII intends to sexually equalize employment opportunity there must be this one exception to the cost differential defense.' " [98]

This Court, in no uncertain terms, declared:

> "[t]he District Court was wrong in assuming, as it did . . . that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.' " [99]

[98] *General Electric*, at 132 (citation omitted).

[99] *General Electric*, at 139 n.17 (citation omitted).

Moreover, rates computed on the basis of unisex mortality tables would be inherently unstable. An employer with a large number of males in his work force would be foolish to purchase annuities from an insurer required to compute rates based upon unisex experience. These rates would reflect the higher costs of providing pension payments to the female segment of the work force. Such an employer, if sufficiently large,[100] would self-insure by establishing a "trusteed" plan pursuant to which pension obligations would be funded based upon the plan's actual experience. Because of the particular composition of his predominantly male work force, this experience would be more favorable to the employer than the unisex rates offered by an insurer.

Those employers who continue to purchase pension coverage will be faced with the fact that the experience of the insurer will be weighted heavily toward the mortality experience previously shown as female experience in sex-segregated tables. As a matter of economics, the unisex rate inevitably would rise to reflect the insurer's claim costs. This, in turn, could be expected to induce additional groups to leave the plan until only those groups with the highest risk of loss would retain their coverage.[101] For the small

[100] Small pension plans do not normally have the option of self-insuring. If a small plan were to self-insure, it would expose itself to the risk that its participants would survive significantly longer than expected and the plan would cost significantly more than it would if insurance had been purchased—perhaps significantly more than the employer could pay.

[101] The history of the insurance industry discloses one prior attempt to disregard differences in risk classification, an attempt which resulted in failure. Certain assessment societies formed in the United States after the Civil War set equal premiums and assessments without regard to the age of the individual member. As the average age of the members increased, and mortality experience worsened, the frequency of assessments increased and the established associations were unable to attract the younger members necessary to keep down the level of necessary payments. Ultimately, the rates necessary to sustain the benefits payable to the older members became too heavy to be borne by the membership, and the associations terminated, leaving members without the protection for which they contributed over a period of a number of years. *See* Bailey, Hutchison & Narber, *The Regulatory Challenge to Life Insurance Classification*, 25 DRAKE L. REV. INS. L. ANN. 779, 784-85 (1976).

employer for whom the option of establishing and funding a trusteed plan is impractical, the logical result would be the elimination of the pension plan.

The use of unisex tables can be anticipated to result in increased costs of pensions. The same actuarial task force which considered the cost of requiring employers to provide equal benefits to male and female employees using the "topping-up" method, made note of the estimate of Teachers Insurance and Annuity Association, that use of a unisex table would result in an increase in contributions of approximately 7%,[102] or $4.2 billion annually.[103]

While the inequity of according similar treatment to dissimilar risks has already been described, one particular argument advanced by some proponents of unisex actuarial tables, such as Professor Barbara Bergmann, requires mention. Under what has become known as the "overlap theory", it has been argued[104] that it is possible to match approximately 83% of males and females as to years of death; that is, if a group of 100,000 males, age 65, and a group of 100,000 females, age 65, were used as a test sample, when all of the members of the group had died, it

[102] BNA Daily Lab. Rep., No. 122, June 23, 1976, at E-3.

[103] *See supra* n.94.

[104] *See* King, *Men, Women, and Life Annuities*, J. RISK & INS. 553, 556-57 and Myers, *Forum: Pension Benefits and Sex*, 9 CIVIL RIGHTS DIGEST 45-46 (1977) which describe and criticize a study by Professor Bergmann.

would be found that approximately 83,000 of the females had died at the same age as approximately 83,000 of the males. Thus, because 17% of the females live longer than a corresponding percentage of the males, it is supposedly unfair to penalize the other 83% of the females who can be paired with males as to age at death by charging females higher annuity premiums.

It should be noted at the outset that the Bergmann study arbitrarily selected as the basis for pairing males and females, the year of death. This is no more correct than pairing by one of the many other possible methods, such as by order of death. Thus, if the first woman who dies is paired against the first man who dies, and this process of consecutive pairing is followed, by the end of the third year no male will be matched against a female who died at the same age. In fact, continuing this process to age 110 for males and age 115 for females leads to pairings over most of the period with the male age at death being five years lower than the age at death of the "corresponding" female.

The logical fallacy and economic irrelevance of the "year of death pairing" approach is obvious when this is viewed in terms of actual dollars. If a company (or a government) were to issue annuities of $1,000 per year to each of 100,000 men and 100,000 women experiencing the mortality rates referred to in the Bergmann study, it would have to make payments of $100,000,000 in the first year to each group. In the fifth year the payments to the male annuitants would have dropped to $90,329,000, while those to the female annuitants would amount to $94,053,000, and in the tenth year annuity payments would have been $73,657,000 to males, and $83,328,000 to females. Over the course of fifty years, an aggregate of $1.561 billion would have been paid to male annuitants and $1.926 billion to females. The females, as a

group, would have received $365 million—23%—more than the males.[105]

Professor Robert J. Myers, formerly Chief Actuary for the Social Security Administration for 23 years, and Professor of Actuary Science at Temple University, criticized the overlap theory in a recent article in *Civil Rights Digest*,[106] a publication of the U.S. Commission on Civil Rights.

He noted that, while the years of death of 84% of men and women coincide, the 16% of unmatched men would have an average age at death of approximately 70 years, and the average age at death of the unmatched women would be approximately 88. He then illustrated the absurdity of the overlap analysis by observing that if the years of death of members of a group of 1,000 men at age 65 are matched with the years of death of a group of men aged 60, there will be an overlap of approximately 85%. Thus, under that theory, it presumably would be improper or unfair to utilize mortality tables based on age in setting insurance premiums. Of course, the logical result of following this mode of analysis is to dispense with any actuarial analysis at all; a result which, we submit, is neither desirable nor mandated by Title VII.

---

[105] Looked at from another perspective, if benefits of $1,000 per year were to be paid to each of 100,000 males beginning at age 65 from a fund earning 5% after taxes and all expenses, such a fund would have to be $1,040,000,000. The corresponding fund needed for female annuitants would amount to $1,194,000,000.

Alternatively, a fund equal to that used to provide $1,000 a month to male annuitants could provide $870 per month to female annuitants. If female annuitants were to draw $1,000 per month from this last fund rather than $870 per month, it would be exhausted after 18 years. For those females surviving beyond that period and receiving no further payments, the overlap theory would provide cold comfort.

[106] Myers, *supra* n.104.

CONCLUSION

This Court, on the basis of a general anti-discrimination statute, is being asked to set aside long-standing and accepted insurance and actuarial practices, the validity of which has been acknowledged by government and industry alike. This should be done only upon the strongest evidence that it was intended by Congress; evidence which is nowhere to be found in the record of this case.

The pension plan established by petitioner does no more than to recognize the undeniable actuarial truth that female employees, on the average, live longer than male employees of the same age. To require identical treatment would be fair to no one. Mr. Justice Frankfurter, in another context, observed that "[i]t was a wise man who said that there is no greater inequality than the equal treatment of unequals." [107] This surely is the case here.

Respectfully submitted,

EDWARD SILVER
LARRY M. LAVINSKY
STEPHEN E. TISMAN
300 Park Avenue
New York, New York 10022
Attorneys for the Amicus

Of Counsel:

PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022

WILLIAM B. HARMAN, JR.
Executive Vice President
American Council of Life Insurance
1850 K Street, N.W.
Washington, D.C. 20006

---

[107] *Dennis* v. *United States*, 339 U.S. 162, 184 (1950) (dissenting opinion).

Supreme Court, U. S.
FILED
NOV 21 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYES RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT W. PHILLIPS,

Defendants-Petitioners,

v.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHYL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 18,

Plaintiffs-Respondents.

Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATE OF OREGON AS AMICUS CURIAE, In Support of Defendants-Petitioners

JAMES A. REDDEN
Attorney General of Oregon
AL J. LAUE
Solicitor General
WILLIAM F. HOELSCHER
Assistant Attorney General
and Counsel
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-6260
Attorneys for the
State of Oregon

TABLE OF CONTENTS

Brief

	Page
Interest of Amicus	1
Statement of Facts	4
Summary of Argument	6
Argument	7
Point One It was not, and is not, the intention of Congress to prohibit the use of age—and sex-differentiated actuarial and annuity tables in implementing the sex discrimination provisions of Title VII of the Civil Rights Act of 1964	7
Point Two The universally acknowledged longevity of females over males is a valid basis for calculating an actuarial return of employe contributed retirement benefits and therefore does not discriminate against females in violation of Title VII	18
Conclusion	38

TABLE OF AUTHORITIES

Cases Cited

Geduldig v. Aiello, 417 U.S. 484 (1974)	29, 30, 31
General Electric Company v. Gilbert, 429 U.S. 125 (1976)	30, 31, 32, 33, 34, 35
Griggs v. Duke Power Co. 401 U.S. 424 (1971)	12, 26
Gruenwald v. Gardner, 390 F.2d 591 (2nd Cir. 1968)	27, 28
Henderson v. State of Oregon, 405 F. Supp 1275 (1975)	3, 4, 6, 18, 20, 24, 35
Hodson v. Jones, 453 F.2d 515 (8th Cir 1971) reh den (1972)	12
Manhart v. City of Los Angeles, 387 F. Supp. 980 (C.D. Cal. 1975)	3, 4, 20, 22, 23, 35
McDonnell Douglas Corporation v. Green, 411 U.S. 792, (1970)	25
Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)	24
Reed v. Reed, 404 U.S. 71 (1971)	28, 29
Reilly v. Robertson, 360 N.E.2d 171	32
Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971)	24

TABLE OF AUTHORITIES—Continued

Cases Cited—Continued

	Page
Schultz v. Wheaton Glass Co., 412 F.2d 259 (3rd Cir. 1970), cert denied 398 U.S. 905 (1970)	12
Smith v. County of Los Angeles, (Cal. C.D. 74-253 D.W.W.)	18
Spirit v. Teachers Insurance and Annuity Assoc. (N.Y. S.D. 74 Civ. 1674 R.J.W.)	18
Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971)	25
Willingham v. Macan Telegraph Pub. Co., 482 F.2d 535 (5th Cir. 1973)	24, 25

Statutory Provisions

United States Constitution, 14th Amendment	3, 4, 29
Employe Retirement Income Security Act of 1974, Pub. L 93-406, 88 Stat. 829, 26 U.S.C.A. §408 and §410, et seq.	16, 17
Executive Order 11246, as amended (3 C.F.R. 169) C.C.H. Employment Practices ¶3675	15
26 U.S.C. §410 et. seq.	17
29 U.S.C. §206(d)	8, 12
29 U.S.C. §206(d)(1)	8, 10, 20
42 U.S.C. §1983	3, 4
42 U.S.C. §2000e et seq.	3
42 U.S.C. §2000e-2	4
42 U.S.C. §2000e-2(a)(1)-(2)	22
42 U.S.C. §2000e-2(h)	10
Cal. Const. Art. I, §1	4
Cal. Const. Art. I, §21	4

Other Authorities

C.C.H. Employment Practices, ¶¶1208 & 1208.31	13
C.C.H. Labor Law Reports ¶30875	15
3 C.F.R. 169	15
29 C.F.R. §800.116(d)	12
29 C.F.R. §1604.9(f)(1972)	20
29 C.F.R. 2610	17
29 C.F.R. 2611	17

TABLE OF AUTHORITIES—Continued

Other Authorities—Continued

	Page
41 C.F.R. 60-20.3(c) (1970), C.C.H. Employment Practices ¶4340.03	15, 16
110 Cong. Rec. 13647 (June 12, 1964)	11
110 Cong. Rec. 13663-64 (June 12, 1964)	11, 12
Current Populations Reports, Population Estimates and Projections Series P-25, No. 704, issued July, 1977, U.S. Department of Commerce, Bureau of Census	21
Equal Employment Opportunities Commission, Sex Discrimination Guidelines, §1604.7, 30 Fed. Reg. 14926, 14928 (December 1965)	19, 20
Equal Employment Opportunity Commission, Sex Discrimination Guidelines, 29 C.F.R. §1604.9(f) (1972), C.C.H. Employment Practices ¶3950.09(f)	32
Equal Pay Act of 1963 (77 Stat. 56)	8, 9, 10, 12, 13, 18
E.E.O.C. Decision No. 74-118	20
30 Fed. Reg. 11504	12
30 Fed. Reg. 14926 (1965)	19
30 Fed. Reg. 14928 (1965)	19
31 Fed. Reg. 6770	12, 13
40 Fed. Reg. 57980	17
40 Fed. Reg. 57982	17
Hearings on House Report 3861 and Related Bills before the Special Subcommittee on Labor of the House of Representatives, 88th Cong., 1st Sess. (1963)	9
Hearings on S. 882 and S. 910 before the Subcommittee on Labor of the Committee on Labor and Welfare, United States Senate, 88th Cong., 1st Sess. (1963)	9
House Report No. 309, 88th Cong., 1st Sess. (1963), U.S. Code, Cong. & Adm. News 1963, pp. 688-689	9
HR 3861 §4(a)	9
HR 6060	9
HR 9155	16
O.F.C.C. Sex Discrimination Guidelines for Government Contractors, 41 C.F.R. 60-20.3(c) (1970), C.C.H. Employment Practices ¶4340.03	15, 16
The Participant, TIAA-CREF, July 1973	26
Senate Report No. 176, 88th Cong., 1st Sess. 4 (1963)	9

TABLE OF AUTHORITIES—Continued

Other Authorities—Continued

	Page
U.S.News & World Report, March 12, 1973, p. 59	21
W-H Opinion Letter No. 1117, August 25, 1970, C.C.H. Labor Law Reports ¶30,681	13, 14
W-H Opinion Letter No. 1276, April 26, 1973, C.C.H. Labor Law Reports ¶30,873	14, 15

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYES RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT W. PHILLIPS,

Defendants-Petitioners,

v.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHYL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 18,

Plaintiffs-Respondents.

Appeal from the United States of Appeals
for the Ninth Circuit

BRIEF OF THE STATE OF OREGON AS AMICUS CURIAE, In Support of Defendants-Petitioners

INTEREST OF AMICUS

The State of Oregon provides for retirement benefits for its employes and for the employes of participating local government subdivisions through the Oregon Public Employes' Retirement System (P.E.R.S.) created by state statute in 1946. The system serves some 700 governmental units in Oregon, including the state and its agencies, counties, cities, police and fire

departments, school districts and numerous special purpose districts. The system currently has some 98,000 active and 21,000 retired participating employes, and assets of over one billion dollars.

The retirement system provides two types of service allowances; an employer-financed "life pension" based on a formula of years of service times final average earnings and an employe-financed individual account "refund annuity." These funds have a separate actuarial and accounting basis but are invested in a common fund.

The employer-financed "life pension" monthly benefit is identical as between similarly-situated male and female employes with greater employer costs and lifetime or total benefits to female employes as a group due to their longer life expectancy. The "refund annuity" portion of the retirement system is wholly employe-financed with contributions which are identical as to similarly situated males and females and are subject to federal and state income tax and other payroll taxes. These contributions are recorded in individual employe accounts. At the time of retirement, total contributions and earnings in an individual employe's account are used to "purchase" an annuity in one of several optional forms by transferring funds to the retirement system's "reserves" for this purpose.

The standard form of the "refund annuity" is one in which the employe receives a monthly benefit for life with a "refund" of unused contributions and earnings to a beneficiary at the time of the retiree's death. The amount of monthly "refund annuity" benefits for each employe is determined by use of age-and sex-differentiated actuarial tables. The actuarial annuity tables used by the retirement system reflect the actual mortality experience of participating male and female members of the fund and their beneficiaries.

In 1974, four female employe members brought an action against P.E.R.S. for declaratory and injunctive relief alleging violations of 42 USC §1983, Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of March 24, 1972 (42 USC §2000e et seq.) and the 14th Amendment to the United States Constitution. The United States District Court for the District of Oregon, the Honorable Gus J. Solomon presiding, found that the use of age-and sex-differentiated actuarial tables to calculate monthly "refund annuity" benefits was in violation of Title VII. *Henderson et al v. State of Oregon,* 405 F. Supp 1275 (D. Ore. 1975). Judge Solomon cited *Manhart v. City of Los Angeles,* 387 F Supp 980 (CD Cal 1975), and relied upon the legal principles expressed by Judge Harry Pregerson in that case.

The State of Oregon appealed the District Court's

ruling to the United States Court of Appeals for the Ninth Circuit, No. 76-1706. Oral argument was scheduled for October 3, 1977. That morning, it was announced that this Court had granted Certiorari to review *Manhart.* The Ninth Circuit Court, being aware of the similarities between the facts in *Manhart* and *Henderson,* removed *Henderson* from the oral argument calendar indefinitely pending decision by this Court.

STATEMENT OF FACTS

This case was brought by plaintiffs under Title VII of the Civil Rights Act of 1964, as amended in 1972, claiming a violation of Section 703 of the Act (42 USC §2000e-2). Three additional and separate claims for relief were based on the Civil Rights Act of 1871, 42 USC §1983, the 14th Amendment to the Constitution, and Article I, §§ 1 and 21 of the Constitution of California.

Plaintiffs are civil service employes of the City of Los Angeles Department of Water and Power and as such are members of a compulsory Retirement Plan of such city Department.

The Plan provides for several kinds of pension benefits at the employe's option. To fund the Plan, the employes and the Department contribute thereto. Because of their longer life expectancy as a group, women are required to make 15% higher contributions

than men to receive equal monthly retirement benefits as between women and men. The Department matches employe contributions 110% and thus contributes disproportionately more for women than for men. Since each employe has an absolute right to the return of all her or his contributions, plus a vested pension right, the present worth of all compensation paid by the Department to women employes is higher than the present worth of all compensation paid to men employes.

The plaintiffs contended in the District Court that differential contributions by men and women were per se illegal. The plaintiffs had not challenged but rather admitted the factual issues in the case that: (1) higher contributions were required of female employes than males because actuarial tables used in the administration of the Plan indicate that women in general live longer than men and that women would therefore tend to collect monthly payments for a longer period of time, (2) life expectancy and mortality tables are universal throughout the western commercial world in separating male mortality rates from female mortality rates, and no tables have yet been developed which measure life expectancy for annuity purposes on a unisex basis, and (3) the use of such tables could lead to a result which adversely affects the financial

integrity of an annuity or pension system such as the City's Plan.

On motion for summary judgment, the District Court held that even rational differentiation was illegal if related to sex:

> "In short, under the Equal Employment Opportunity Act of 1972, all stereotypic treatment of persons based on . . . sex whether rational or irrational is dead."

The District Court also enjoined larger contributions from females than males and ordered this Plan to refund the excess contributions collected on and after April 5, 1972, plus interest. The Court did not rule on claims based on §1983, the Fourteenth Amendment or the California Constitution.

Defendants appealed to the Ninth Circuit. The Court stayed the District Court's judgment pending appeal, insofar as it requires the refund of contributions. The Ninth Circuit Court opinion affirmed the District Court decision on all issues. In its opinion, the Ninth Circuit Court stated in part:

> "One district court case has dealt with a situation very similar to ours. In *Henderson v. Oregon,* D. Ore., 1975, 405 F. Supp. 1271, the court relied heavily on a scheme similar to that involved here illegal under Title VII."

SUMMARY OF ARGUMENT

(1) Legislative history indicates that Congress intended, and still intends to permit the use of age- and sex-differentiated mortality tables as a basis for determining pension benefits under all applicable federal statutes.

(2) The use of age- and sex-differentiated actuarial and annuity tables to calculate monthly "refund annuity" retirement benefits which provide an actuarial return of employe contributions does not discriminate against female employes because such tables validly reflect the universally acknowledged longevity of females over males and are a reasonable sex-based classification for the valid purposes of maintaining actuarial soundness of the retirement fund.

(3) The Title VII Sex Discrimination Guidelines of the EEOC and EEOC Decision No. 74-118 are of no assistance in determining this issue because of the delegation by Congress to and the rulings of other equally responsible federal agencies.

ARGUMENT

Point One

It was not, and is not, the intention of Congress to prohibit the use of age- and sex-differentiated actuarial and annuity tables in implementing the sex discrimination provisions of Title VII of the Civil Rights Act of 1964, as amended.

Congressional history shows that it was not, and is not, the intention of Congress to prohibit the use of

sex-differentiated actuarial tables in funding pension systems and distributing benefits.

(a) *Congressional Intent in 1964:*

When Congress enacted Title VII of the Civil Rights Act of 1964 it did so against the background of the passage of the Equal Pay Act of 1963 (77 Stat 56) just the year before. The Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act of 1938, specifically section 6(d) (29 USC §206(d)) and required employers to pay equal wages for substantially equal work without regard to sex.

The heart of the Equal Pay Act is Section 6(d)(1) (29 USC §206(d)(1)):

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the bases of sex by paying wages to employes in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, *except where such payment is made pursuant to* (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex:* Provided, Than an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." (Emphasis supplied)

The legislative history of the Equal Pay Act shows that different periodic pension benefits resulting from differences in longevity is precisely the sort of "differential" intended by exemption (iv) of Section 6(d)(1). In the original subcommittee version of the bill, the sole exception to the equal pay rule permitted differentials between males and females only when based upon a "seniority or merit increase system." (HR 3861, §4(a); S 882, §4, and S 910, §4(a), 88 Congress, First Session (1963)). Testimony at Senate and House hearings in March and April, 1963, raised the objection that it costs more to employ women than men, and that these added expenses ought to be a justification for wage differentials. One of the specific examples cited as an increased cost to employ female workers was the additional cost of providing retirement benefits due to greater longevity of women (Hearings-Senate at 142, 145; Hearings-House at 103, 184-188, 241). As a result, a bill was reported out of the committees in both houses of Congress with a new provision excepting from the requirement of equal pay for equal work "a differential based on any factors other than sex." (HR 6060, quoted in HR 309 and S Rep 176 (88th Congress Session (1963)). The Senate reports specificlly noted the longevity problem at issue here (S Rep 176, *supra,* at 4) and indicated that such

differences in cost would constitute a "factor other than sex" justifying a differential in wages:

> "It is the intention of the committee that where it can be shown that on the basis of all of the elements of the employment costs for both men and women, an employer will be economically penalized by the elimination of a wage differential, the secretary can permit an exception similar to those he can permit for a bonafide seniority system or other exception mentioned above." *Ibid.*

When Congress enacted Title VII of the Civil Rights Act in July of 1964, it was a concern that Title VII was not in conflict with the Equal Pay Act. It therefore added that part of Section 703(h) of Title VII (42 USC §2000e-(h)) known as the Bennett Amendment. This amendment "interlocks" Title VII with the exceptions provided by Section 6 of the Equal Pay Act:

> "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employes of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended." (29 USC 206(d).

The first three exceptions of the Equal Pay Act relating to seniority systems, merit systems, and systems measuring earnings by quantity or quality of production (exceptions i, ii and iii of 29 USC 206(d)(1)) were already specifically included in §703(h) of the Civil Rights Act. The only additional exception

presented by the Bennett Amendment was the fourth exception involving differentials "based on any other factor other than sex." The intent of this amendment was to incorporate into Title VII the defenses that were permitted by the Equal Pay Act. 110 Cong Rec 13647 (June 12, 1964).

The Bennett Amendment specifically contemplated differences in pension and retirement benefits between men and women. This is clearly stated in a colloquy between Senator Humphrey, the floor manager of the civil rights bill in the Senate, and Senator Randolph (110 Cong Rec 13663-64, June 12, 1964):

> "Mr. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota [Mr. HUMPHREY], who is the effective manager of the pending bill, a clarifying question on the provisions of title VII.
>
> "I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing.
>
> "Am I correct, I ask the Senator from Minnesota, in assuming that *similar differences of treatment in industrial benefit plans,* including earlier retirement options for women, *may continue in operation under this bill, if it becomes law?*
>
> "Mr. HUMPHREY. *Yes. That point was made unmistakably clear earlier today by the adoption of*

the Bennett amendment; so there can be no doubt about it.

"Mr. RANDOLPH. I am grateful for the reply." (Emphasis added)

Thus, the legislative history of §703 of Title VII shows the clear Congressional intent to preserve the exceptions of the Equal Pay Act of 1963 (29 USC §206(d)). And *see Schultz v. Wheaton Glass Co.,* 412 F2d 259 (3rd Cir 1970), *cert den* 398 US 905 (1970), where the court held that the Civil Rights Act and the Equal Pay Act are *in pari materia,* and must be read together.

(b) *Administrative Interpretation.*

The Wage-Hour Administrator is charged with the administration of the Equal Pay Act and his opinions are entitled to "great deference" (*Griggs v. Duke Power Co.,* 401 US 424, (1971)). He has repeatedly and implicitly recognized that actuarial differential treatment of men and women does not violate the Equal Pay Act (*Hodson v. Jones,* 453 F2d 515, 518 (8th Cir 1971), *reh den* (1972)). For instance, the current Wage-Hour Equal Pay Act administrative regulations, 29 CFR §800.116(d) (30 FR 11504, September 9, 1965, as amended at 31 FR 6770, May 6, 1966) provide:

> "(d) *Contributions to employee benefit plans.* If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees."

In interpreting these administrative regulations, the Wage-Hour Administrator has consistently made determinations that no wage differential prohibited by the Equal Pay Act will result if no contributions are made by the employer to the benefit plan or where either the contributions to or the resulting benefits from the plan are equal for both sexes. In his first determination on the subject, Wage and Hour Opinion Letter (January 27, 1967), the Administrator held that if no contributions to an employe group insurance plan are made by the employer, such differentials do not violate the Equal Pay Act (CCH Employment Practices, ¶¶1208 and 1208.31). In Opinion Letter No. 1117 (WH-70) dated August 25, 1970, the Administrator stated in part:

> "This is in further reference to your letter in which you inquired about the application of the equal pay provisions to the amounts an employer contributes toward a retirement or pension plan in behalf of his employees. . . . After giving the question considerable study in the light of the complex issues involved, we have now arrived at a determination

that an employer's contributions to a plan providing retirement or pension benefits to his employees will be considered as 'wages' within the meaning of the Equal Pay Act. We are, therefore, taking the position that where an employer's contributions to such a plan are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to employees in question may be greater for one sex than for the other. The fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered a violation of the Equal Pay Act if the resulting benefits are equal for employees of both sexes where the equal pay standard otherwise applies."

In Opinion Letter No. 1276 (WH-224) dated April 26, 1973, the Administrator again reviewed the problem in the light of the adoption by the EEOC of its 1972 contrary administrative regulations. In the letter, the Administrator states in part:

"Specifically you ask: 'If an employer makes equal contributions to a retirement plan covering male and female employees but if, as a result of separate actuarial tables used by the plan's administrators, the female employees, other things being equal, receive smaller monthly retirement benefits, is the employer in violation of the equal pay provisions.' "

In finding that the Employer would not be in violation, the Administrator states in part:

"In response to your initial question, our opinion letter of August 25, 1970 [W&H Opinion Letter No. 1117] sets forth our current position under the

Equal Pay Act. We are cognizant of the recent amendments to the Civil Rights Act and the Guidelines issued by Equal Employment Opportunity Commission [EOCC] on pension benefits and we will continue to watch developments in this area. However, we do not anticipate any change in our position in the immediate future."

In sum,

"An employer is not in violation of the equal pay provisions of the Fair Labor Standards Act if it makes equal contributions to a retirement plan covering male and female employees but, as a result of separate actuarial tables used by the plans administrators, female employees, other things being equal, receives smaller monthly retirement." CCH Labor Law Reports ¶30875.

This interpretation is also embodied in the sex discrimination guidelines of the Office of Federal Contract Compliance (OFCC) to whom the Secretary of Labor has delegated the responsibility of implementing Executive Order 12246 as amended (3 CFR 169). In substance, that order provides that all government contracting agencies shall include specific terms in their contracts to provide for non-discrimination in employment by government contractors and their subcontractors. The original OFCC sex discrimination guidelines state:

"The employer must not make any distinction based upon sex in employment opportunities, wages, hours, or other conditions of employment. In the area of employer contributions for insurance, pensions, welfare programs and other similar

'fringe benefits' the employer will not be considered to have violated these guidelines if his contributions are the same for men and women or if the resulting benefits are equal." 41 CFR 60-20.3(c) (1970).

As recently as June 14, 1975, the Secretary of Health, Education and Welfare has ruled concerning discrimination in educational institutions:

"HEW is responsible for administration, pursuant to OFCC regulations, of the Executive Order as to Federal contractors who are educational institutions, Virtually all recipients subject to this Part 86 are also subject to Title VII and many are also subject to the Executive Order. * * *

"Accordingly, [the Secretary] continues to follow the Executive Order regulations in requiring that fringe benefit plans provide either for equal periodic benefits to members of each sex or equal contributions by the employer for members of each sex (§86.39 imposes identical requirements for student benefit plans). The Title VII Sex Discrimination Guidelines of the EEOC differ in that they prohibit payment of unequal periodic benefits on the basis of sex and preclude employers from justifying unequal periodic benefits on the basis of differences in cost for males and for females." 40 Fed Reg 24135 (June 4, 1975).

(c) *Present Congressional Intent*

In 1974, Congress enacted the Pension Reform Act of 1974 (the Employee Retirement Income Security Act of 1974, commonly "ERISA"), to ensure proper pension funding (P L 93-406, 88 Stat 829). Presently before Congress is HR 9155, a bill to provide the same

pension reform for state and local public service employes to be entitled the "Public Service Employees Retirement Income Security Act of 1975." The provisions of the proposed public ERISA are almost identical with those of the private ERISA which is now law.

There are two very significant factors in ERISA which must be considered in determining this case. First, there are certain minimum funding standards with actuarial requirements (Act §302-305, 1013, 26 USCA (IRC 1954) §410, et seq). Second, under the act (Act §2002(b), IRS §408) an employe may leave an employer and transfer both his own and the employer's plan contributions to an individual retirement account or to a different employer's plan. The agency specifically established by Congress to ensure pension plans under ERISA, the Pension Benefit Guaranty Corporation (Act §§4001-40821) has already recognized the propriety of using sex-differentiated actuarial tables:

On December 12, 1975, the Pension Benefit Guaranty Corporation published proposed regulations on the valuation of plan assets and benefits (40 FR 57980, 57982, 29 CFR 2610, 2611). In the valuation of plan benefits under ERISA requirements, the federal agency has proposed six sex-differentiated mortality tables—a male and a female table of healthy participants, a male and a female table for disabled

participants, and a male and a female table for disabled participants receiving social security disability benefit payments.

Point Two

The universally acknowledged longevity of females over males is a valid basis for calculating an actuarial return of employe contributed retirement benefits and therefore does not discriminate against females in violation of Title VII.

This case is one of first impression. The Court's holding in this case may well, however, decide or control the Ninth Circuit Court's decision in *Henderson, supra.* Additionally, this case is the harbinger of a number of cases the holding in which could affect the financial soundness of public, as well as private, pension plans across the country. *See, e.g., Smith v. County of Los Angeles,* (Cal CDD 74-253 DWW) and *Spirit v. Teachers Insurance and Annuity Assoc.,* (NY SD 74 Civ. 1674 RJW). The full impact of this Court's decision in *Henderson, supra,* will be widespread and profound.

The congressional intent expressed in the legislative history previously reviewed and the determinations of the Wage-Hour Administrator made applicable to this matter by the Title VII—Equal Pay Act "interlock" provision of §703(h), *supra,* provide no basis for a finding that the increased contributions

required of females to receive equal benefits in this case in any way violate §703(a) of Title VII.

In the past, the EEOC has expressly honored this congressional intent in its guidelines (30 FR 14926, 14928, December 2, 1965); §1604.7 provided in relevant part as follows:

> "Section 1604.7. Relationship of Title VII to the Equal Pay Act.
>
> "(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (Section 6(d) of the Fair Labor Standards Act of 1938, 29 USC 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets §703(a) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII.
>
> ". . . . .
>
> "(b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. . . ."

The EEOC followed the Wage-Hour Administrator's interpretations until April, 1972, when it declared that it would no longer be bound by the Wage and Hour Administrator's interpretations. It then revised its guidelines to state that:

> "It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory

> retirement ages based on sex, or which differentiates in benefits on the basis of sex." (29 CFR §1604.9(f) (1972)).

In its first interpretation of this revised guideline two years later (No. 74-118, April 26, 1974), the EEOC concluded that the use of separate mortality tables for men and women to determine retirement benefits was in violation of Title VII.

The revised EEOC sex discrimination guidelines are in opposition to the congressional intent in Title VII and in direct conflict with the fourth exception to the Equal Pay Act which permits a compensation "differential based on any other factor other than sex. . . ." 29 U.S.C. §206(d)(1). The district court in the *Manhart* case, *supra* at 984, and the district court in the *Henderson, supra,* disposed of the defendant's contentions in this regard with the conclusion:

> "Even if section 206(d)(1) (of the Equal Pay Act) applies to this case, the court believes that differentiation based on sex segregated actuarial tables constitute a differential based on the 'factor' of sex in violation of that section."

This conclusion of the district courts below is not only in opposition to the congressional intent but fails to recognize the universally accepted scientific fact that women have a greater life expectancy than men. Plaintiffs in both cases accept this fact. It is a

universal truth.[1] The data presented to the district courts in both cases detailed the reliance of all pertinent federal agencies on the fact of this longevity differential. The United States Bureau of Census, estimates that this differential is growing, and between now and the year 2050, United States women can expect a life span of up to 81 years and men up to 71.8 years.[2] This is an increase in longevity of four years for women and almost three for men.

Section 703(a) of Title VII of the Civil Rights Act of 1964 enumerates the unlawful practices of "employers" covered by this act. These practices are divided into discrimination *against individuals* and unlawful *classification* of employes because of "race, color, religion, sex or national origin."

Section 703(a) provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(1) To fail or refuse to hire or to discharge any individual, or otherwise *to discriminate against any individual* with respect to his compensation, terms, *conditions or privileges of employment* because of such individuals's race, color, religion, sex or national origin."

---

[1]See for example U.S. News and World Report, March 12, 1973, p 59, where all of the 25 countries listed in the United Nations' population report showed greater female longevity than male; in the United States women lived an average of 7.5 years longer.

[2]Current Populations's Reports, Population Estimates and Projections Series P-25, No. 704 issued July, 1977, United States Department of Commerce, Bureau of Census.

> "(2) To limit, *segregate, or classify his employees* or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his satus as an employee, because of such individual's race, color, religion, sex or national origin." 42 USC §2000e-2(a)(1)-(2). (Emphasis added)

An employe has a right of action under either of these provisions, but the proscribed condition in section (1) is discrimination against the employe as an *individual,* while section (2) concerns itself with an individual's loss of rights by segregation or *classification* into unlawful groupings.

The Second Amended Complaint in this matter did not specify which kind of discrimination was being alleged. Defendants denied either kind.

The district court determined that the major question on the Motion for Summary Judgment was: ". . . whether the Department's practice of requiring women to make larger monthly contributions to the retirement plan than men constitutes "[discrimination] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." within the meaning of §703(a)(1) of the Equal Employment Opportunity Act of 1972. 42 U.S.C.A. §2000e-2(a)(1) (West 1974). *Manhart, supra.* Apparently, the court's decision to place the alleged discrimination

under §703(a)(1) rather than §703(a)(2) was based on its view that ". . . sexual discrimination under §703(a)(1) exists whenever general fact characteristics of a sex-defined class are automatically applied to an individual within that class." (Cases cited) *Manhart, supra.* Because of its conclusion that ". . . all stereotypic treatment of persons based on race, religion, or sex whether rational or irrational is dead.", the District Court did not reach the issue of whether the *classification* was reasonable or for a valid and necessary purpose.

The record shows defendants have not discriminated against plaintiffs as *individuals* in any terms or conditions or employment. Plaintiffs have been treated as *members of a class* because it is not possible to treat persons as individuals for annuity pension purposes. There is no test which will indicate when an *individual* will die; one must look at some sort of *group* or *class* mortality statistics to even approximate when retirement will be terminated by death.

The actuarial and annuity tables at issue in this case accurately reflect the life expectancy of individual retirees by the classifications of age and sex at the time of retirement. Because the *only* use of the tables is to determine *how long* the retiree may be expected to live so that the contributions he or she has made can be returned over the number of months and years they

will be needed, the tables classify employes as to *life expectancy,* not sex. Thus, a person with a life expectancy at retirement of 10 years will receive a pension in periodic payments of precisely the same amount as every other person choosing the like option with the same contributions and a life expectancy of 10 years. This is so whether the individual is male or female.

Grouping individuals for actuarial purposes is thus necessary for there to be any pension system *at all.* The question remains as to whether grouping *by sex* is permissible sex "stereotyping." The district courts in this case and in *Henderson, supra,* thought it was. They were wrong.

The district court relied on a line of cases dealing with the application of general fact characteristics of a sex-defined class[3] to arrive at the conclusion that "all stereotypic treatment of persons based on race, religion, or sex whether rational or irrational is dead." All of these cases involved "stereotypic treatment" which was irrational and based neither on fact nor business necessity. *Phillips, supra,* dealt with the denial of employment to women with pre-school children, where men with pre-school children were being hired. In *Rosenfeld, supra,* the court considered an employer's

[3] *Phillips v. Martin Marietta Corp.,* 400 US 542 (1971); *Rosenfeld v. Southern Pacific Co.,* 444 F2d 1219 (9th Cir 1971); *Sprogis v. United Air Lines,* 444 F2d 1194 (7th Cir 1971); *Willingham v. Macan Telegraph Pub. Co.,* 482 F2d 535 (5th Cir 1973).

policy of excluding women from consideration for jobs requiring lifting in excess of certain weight limitations. *Sprogis, supra,* grappled with whether the employer could enforce a "no-marriage" rule on female flight stewardesses when no such rule applied to males. *Willingham, supra,* concerning the fate of long haired males versus long haired females under a company dress code.

Title VII must be given a practical construction to promote the ends it was designed to achieve, *McDonnell Douglas Corporation v. Green,* 411 US 792 (1970). The decisions discussed are consistent with such a practical construction. It was a simple matter for the court to require the employer to make its employment decision by considering an individual female applicant based on her own strength. It *can* and, therefore, should be determined whether a woman can lift a 40-pound weight or whether a woman can perform effectively as an airline stewardess while married or as a working mother with children. Likewise, the business necessity and reasonableness of an employe dress code can and should be easily determined.

But these typical sex discrimination cases, though involving classification rather than individual discrimination, cannot be equated with the present case. The very nature of a pension annuity requires careful selection and classification to provide an equitable

allocation of benefits to the annuitants who contributed them and to insure the continuation of a viable fund.

This Court must consider the practical *need* for using such tables as a principal factor in determining whether the use of these tables in the context of this case constitutes the type of invidious treatment based on sex Title VII was designed to prevent.[4]

It is undisputed that females as a class live longer than males and that younger people as a class live longer than older people. That is why the defendants use age- and sex-differentiated actuarial and annuity tables similar to those used by the insurance industry, the IRS and other federal agencies; the only difference is defendants' tables are validated because they are based upon the actual experience of this fund.

Further, factors other than age and sex have not been considered satisfactory indicators of longevity. For example, although blacks have a higher death rate than whites, given the same economic and environmental factors, race or color is of no consequence. The *Participant* TIAA-CREF, July 1973. Since black and white annuitants under this plan enjoy comparable economic and environmental circumstances, no dis-

[4] *See Griggs v. Duke Power Company,* 401 US 424, 430-431 (1971):

"What is required by Congress is the removal of *artificial, arbitrary,* and *unnecessary* barriers to employment when the barriers operate *invidiously to discriminate* on the basis of racial or other impermissible classifications." (Emphasis added)

tinction can or should be made. Similarly, although smoking and drinking can affect longevity, the extended period covered by annuities plus the group concept make such individual personal habits unmeasureable objectively. *Ibid.*

Sex and age emerge as the only actuarially viable indicators of longevity. Although such classifications do not insure perfect justice among all annuitants, they do insure in large measure an equitable distribution of benefits as well as the solvency of the employe-contributed fund.

Assuming arguendo that this Court finds that the age- and sex-differentiated actuarial and annuity tables which require increased contributions by women are based on fact, are rational and reasonable, and are a business necessity in the employe contribution supported pension annuity context, does Title VII still flatly invalidate such tables because they represent a sex-related classification however rational?

In *Gruenwald v. Gardner,* 390 F2d 591, 592 (2nd Cir 1968), the court considered a challenge to the Federal Social Security Act by a man who received less monthly benefits at age 62 than a woman would have received similarly situated. The Court upheld the differentiated benefit formula on a constitutional basis with dicta on the issue of Title VII and stated:

"It is only the 'invidious discrimination' or the

classification which is 'patently arbitrary [and] utterly lacking in rational justification' which is barred by either the 'due process' or 'equal protection' clauses. [Citations omitted] A classification or regulation, on the other hand, 'which is reasonable in relation to its subject and is adopted in the interests of the community is due process.'

". . . .

"The appellants' case was well and forcefully presented but the trend of authority makes it clear that the variation in amounts of retirement benefits based upon differences in the attributes of men and women is constitutionally valid. *The appellant does not press his argument that the section in question is violative of the Civil Rights Act of 1964,* 78 Stat. 253 (1964), *but we find that contention is also without merit."* 390 F2d at 592-593. (Emphasis supplied)

This Court in *Reed v. Reed,* 404 U.S. 71, 75-76 (1971), unanimously articulated the proper analysis for a constitutional claim of improper sex classification:

> "In applying [equal protection standards] this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. . . . The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "

The criterion to be used in applying the *Reed* analysis to circumstances such as those presented in the instant case was enunciated by this Court recently in *Geduldig v. Aiello,* 417 U.S. 484 (1974). That case concerned California's disability insurance system, which excluded from coverage disability accompanying normal pregnancy and childbirth. The plaintiff claimed that this exclusion violated her rights to equal protection of the law under the Fourteenth Amendment. Like the plaintiffs' argument in this case, the plaintiff in *Aiello* contended that *any* distinction based upon differing characteristics of men and women was unconstitutional. The contention was summarized by Justice Brennan in his *Aiello* dissent:

> "In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination." 417 US at 501.

The majority in *Aiello* rejected this argument. Justice Stewart, writing for the majority, first distinguished the situation before the Court from cases in which distinctions had been drawn between men and women based solely upon their gender:

> "The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed,* 404 U.S. 71, and *Frontiero v. Richardson,* 411 U.S. 677,

involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition —pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra.*" 417 US at 496, n 20.

The opinion continued, in language having direct application to this case:

"Normal pregnancy is an *objectively identifiable physical condition* with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." *Id.* (Emphasis supplied)

The instant case, no less than *Aiello,* involves a distinction based upon an "objectively identifiable physical condition," *i.e.,* greater female longevity. Here, the fact of female longevity is "objectively identifiable" through the use of established statistical techniques.

In *General Electric Company v. Gilbert,* 429 U.S. 125 (1976), this Court reversed the decision of six separate Courts of Appeals which had held that Title

VII required employers to pay the extra cost of pregnancy disability coverage for women. Applying the same analytic approach applicable to Equal Protection Clause claims enunciated in *Geduldig v. Aiello, supra,* the Court held that exclusion of pregnancy related disabilities from an otherwise comprehensive nonoccupational sickness and disability plan was not invidious gender-based discrimination in violation of Title VII. The Court held that, so long as an employer provided insurance of *equal value* to men and women, there was no requirement under Title VII that payment also be made for an extra risk which may be presented by one sex. Speaking for the Court, Justice Rehnquist reasoned (429 U.S. at 139, n. 17):

"Absent proof of different values, the cost to 'insure' against the risks is, in essence, nothing more than extra compensation to the employees, in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the 'insurance,' there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the 'extra' disabilities due to pregnancy. . . .

"Yet, in both cases—the instant case and the case where there is no disability coverage at all—the ultimate result is that a woman who wished to be fully insured would have to pay an

incremental amount over her male counterpart due solely to the possibility of pregnancy-related disabilities. Title VII's proscription on discrimination does not require, in either case, the employer to pay that incremental amount. *The District Court was wrong in assuming, as it did, 375 F. Supp., at 383, that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.' "(Emphasis added).*

Turning to the EEOC 1972 Guidelines, the Court held that such guidelines conflict with earlier EEOC pronouncements, are at odds with the consistent interpretations of the Wage and Hour Administrator with respect to §703(b) of Title VII, as amended by the Equal Pay Act, and with the legislative history of Title VII, both of which support the "plain meaning" of the language used by Congress when is enacted §703(a)(1). The Court stated (429 U.S. at 412):

> "Contrary to it (EEOC guideline of 1972) are the consistent interpretation of the Wage and Hour Administrator, and the quoted language of Senator Humphrey, the floor manager of Title VII in the Senate. *They support what seems to us to be the 'plain meaning' of the language used by Congress when it enacted §703(a)(1).*" (Emphasis added).

The Supreme Court of Indiana considered a sex-differentiated actuarial table equal protection and Title VII complaint less than three months after this Court's opinion in *Gilbert, supra; Reilly v. Robertson,*

360 N.E.2d 171. In a 3 to 2 decision which makes no reference to *Gilbert,* the Indiana Supreme Court found that the State Teachers' Retirement Fund's use of separate actuarial tables for men and women retired teachers violated the equal protection clauses of the Constitution of the United States and of Indiana without reaching a determination of the Title VII violation contentions. Of the two concurring opinions, one Judge stated that he did so on the sole basis that ". . . there is no showing or evidence presented by the Appellant Board that women *teachers* live longer than men *teachers.*" (Emphasis added). If such evidence had been present as in the case below and in Henderson, supra, query whether a 3 to 2 majority would have found no violation. In his dissenting opinion Chief Judge Given stated (360 N.E.2d at 180) in part:

". . .

> "There is no question that the law stated by the majority is correct in that the equal protection clauses of the Constitutions of the United States and of Indiana and the Civil Rights Act of 1964 all require that persons receive equal treatment. However I do not agree with the majority that when this law is applied to the facts in the case at bar the result is an invalidation of the adoption of the separate actuarial table for men and women retired teachers for the purpose of the computation of their benefits to be paid from the Teachers' Retirement Fund.
>
> "Prior to the adoption of that method of determining benefits, men teachers and women teachers

were charged equal premiums for their participation, and upon retirement, were given equal monthly benefits. Because of the fact, which is recognized by the majority, that women have a greater life expectancy than men, the result was an unequal treatment based upon sex. This unequal treatment favored women retirees, in that as a group they received the same monthly benefits, but received them for a longer period of time due to their longevity.

"It is obvious from the facts of the case that the Board determined that such unequal treatment should not prevail and the sexes should be treated equally. There were two avenues to pursue which would have resulted in equal treatment. One was to charge the men a smaller premium during their period of actual service, and upon retirement give equal payment to men and women. The other was to charge an equal premium regardless of sex, but upon retirement to pay a smaller monthly amount to the women retirees. The Board obviously chose the latter.

"The majority opinion points out that some women live no longer than some men and, in fact, some live a shorter time than some men. However the fact remains that given an equal number of men and women commencing retirement at a point in time, when all of the men have died, there will still be living approximately 17% of the women retirees who will continue to receive their monthly payment. Theoretically, at the time of the death of the last woman, an equal amount of retirement pay will have been received by the group of men and by the group of women. It therefore appears the action of the Board, rather than depriving persons of equal rights, has in fact equalized the benefits under the program.

"I would therefore hold the Board's action was entirely proper and that it did in fact cure a situation which was unequal so far as the sexes were concerned.

". . ."

In *Manhart, supra,* the fund required unequal contributions for equal monthly benefits. In *Henderson, supra,* the fund provides unequal monthly benefits for equal contributions. In either case, the need for higher contributions or lower monthly benefits must be determined by the life expectancy of the individual employe as may be gleaned only from a sex-differentiated actuarial table or a so-called "unisex" table.

First, it should be noted that the term "unisex annuity table" is not only a misnomer, it does not exist anymore than a "unisex" person exists. If a "unisex" annuity table were to be developed, it would itself be sex based. On the surface a "unisex" table would appear to merely be an averaging of the current individual male and female life expectancies. In fact, however, a "unisex" annuity table, like all annuity tables, would have to measure and project the life expectancy of the group. In order to know how many years the group might be expected to live, the actuaries would have to know how many members of the group are male and how many are female. As the composition of the group changes in percentage of

males and females, the group's "unisex" life expectancy will change—perhaps dramatically. The current sex-differentiated tables predict life expectancy of the group with a high degree of accuracy which remains unchanged over the years except for gradual increases in longevity brought about by advances in medical science and the standard of living. A so-called "unisex" table could be developed today, incur liabilities with an existing group at a contribution rate which could be seriously incorrect in a few years due to dramatic changes in the sex composition of the group work force. If females are not required to contribute more than males for equal monthly benefits or unless female monthly benefits are made smaller than males to account for longer female longevity, the 15% differential in cash must be borne by the employer or by transfer of male contributed funds to females or the parties must face the ultimate financial failure of the fund.

A "unisex" table which calculates monthly benefits for females at the current level for males would be actuarially false and cannot be supported by current employe contribution levels. Since existing pension benefits are vested, they cannot be reduced under the state trust law. Further, since the required contributions by the sexes must be equal, an increase in the level of employe contributions to fund the equalization

of female contributions would necessarily result in additional disparity in the cost-benefit ratio for males.

If employe contributions were made voluntarily rather than a "condition of employment," it can reasonably be expected that the males would buy their annuities from private insurance carriers whose rates would still reflect the lower cost for men than women. The constitutency of the fund would become predominately female, the rate of annuity benefit pay-out would seek its own level (i.e. female) and women would receive only that amount of monthly benefits their contributions can actuarially "purchase."

When one considers that the females as a class are already receiving a greater contribution from the employer than males (in the form of a 110% matching employer contribution of a greater female contribution) and even a short lived female or her beneficiary will receive no less than a return of all her contributions plus earnings thereon, it becomes increasingly difficult to equate their treatment with "invidious" sex discrimination in violation of Title VII.

It is submitted that the overall effect of the retirement system is quite fair and in fact favors females.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court should be reversed.

Respectfully submitted,
STATE OF OREGON
JAMES A. REDDEN
Attorney General
AL J. LAUE
Solicitor General
WILLIAM F. HOELSCHER
Assistant Attorney General
and Counsel

baw

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief Amicus Curiae have been served by mail, this date to David J. Oliphant, Deputy City Attorney, 111 North Hope Street, P.O.Box 111, Los Angeles, California 90051; Katherine Stoll Burns, Robert M. Dohrmann, Howard M. Knee; Schwartz, Steinsopher, Dohrmann & Krepock, Two Century Plaza, Suite 1900, 2049 Century Park East, Los Angeles, California 90067; A.C.L.U., Michael Evan Gold, 3636 Somerset Drive, Los Angeles, California 90016; Equal Employment Opportunity Commission, Abner Sibol, Joseph T. Eddins, Beatrice Rosenberg, Charles L. Reischel, Mary-Helen Mautner, 2401 E Street, N.W., Washington, D.C. 20506, and John H. Larson, County Counsel, Ronald J. Selfroth, Deputy County Counsel, 648 Hall of Administration, 500 West Temple Street, Los Angeles, California 90012.

WILLIAM F. HOELSCHER
Assistant Attorney General and
Counsel
Of Attorneys for State of Oregon

Supreme Court, U. S.
FILED
DEC 21 1977
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977
NO. 76–1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, etc., et al.,

Petitioners,

v.

MARIE MANHART, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENTS

Michael Evan Gold
New York State School of Industrial
and Labor Relations,
Cornell University
P. O. Box 1000
Ithaca, New York 14853

Fred Okrand
Jill Jakes
ACLU Foundation of Southern California
633 So. Shatto Place
Los Angeles, California 90005

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Table of Authorities.....ii

Interest of the Amicus..... 2

Statement of the Case..... 3

Summary of the Argument..... 5

Argument..... 6

I. By deviating from Congress's definition of equality of opportunity in retirement funds, the petitioner disadvantages female employees..... 9

II. By measuring and spreading the cost of longevity over sex-segregated classes, the petitioner disadvantaged its female employees because of their sex.....22

Conclusion.....32

TABLE OF AUTHORITIES

Cases

Califano v. Goldfarb, 430 U.S. 199 (1977).....11,25

Fleming v. Nestor, 363 U.S. 603, 609 (1960)..... 11

Frontiero v. Richardson, 411 U.S. 677 (1973)..... 25

Geduldig v. Aiello, 417 U.S. 484 (1974)..... 21

General Electric v. Gilbert, 429 U.S. 125 (1976)..... 21

Henderson v. Oregon, 405 F. Supp. 1271 (D. Ore. 1975), appeal pending in the Ninth Circuit..... 21

Reed v. Reed, 404 U.S. 71 (1971)..... 25

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).....11,25

Statutes

Civil Rights Act of 1964, Title VII.....Passim
§ 703(a)(1), 42 USCA § 2000e-2(a)(1)..... 20

§ 703(a)(2), 42 USCA § 2000e-2(a)(2)..... 20,25

Pub. L. 88-643..... 12

5 USCA §§ 8331 et seq. 12

10 USCA § 1401 et seq. 13

22 USCA §§ 1061 et seq. 12

28 USCA §§ 371..... 13

29 USCA § 206(d)..... 18

42 USCA §§ 401(a) et seq. 10

45 USCA §§ 231 et seq. 12

50 USCA § 403 note..... 12

Cal. Gov. Code § 7500..... 30

Miscellaneous

110 Cong. Rec. 2728..... 27

110 Cong. Rec. 13663-4..... 9

Article

Gold, "Equality of Opportunity in Retirement Funds," 9 Loy. L. A. Law Rev. 596 (1976).... 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, etc., et al.,

Petitioners,

—— v. ——

MARIE MANHART, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE*

The ACLU Foundation of Southern California is an organization dedicated to the preservation of the rights guaranteed by the Bill of Rights of the Constitution of the United States. Included in this is the equal protection of the laws, which encompasses, inter alia, equality of employment opportunities regardless of race, color, religion, sex, or national origin.

The instant case involves important questions concerning employment discrimination because of sex. Defendants on their appeal challenge and seek to overturn the lower courts' decisions which invalidated that discrimination. Amicus

*The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

believes the rulings of the District Court and the Court of Appeals were correct and seeks to present its views in this regard. Hence this brief amicus curiae.

STATEMENT OF THE CASE

Separate and unequal retirement plans were effectively maintained by the petitioner, City of Los Angeles Department of Water and Power. One plan was for its male employees. The other plan was for its female employees who, as a class, are the respondents. Membership in one plan or the other was compulsory for all employees. Although the plans resembled each other, in that they awarded benefits according to similar rules, each of the two plans had its own members and beneficiaries, its own sources and rates

of funding, and its own actuarial foundation:

--Only men and their families were members and beneficiaries of the male fund. Only women and their families were members and beneficiaries of the female fund.

--No men contributed to the female fund. No women contributed to the male fund.

--Contributions to the male fund were determined by actuaries who relied on mortality tables for the male population. Contributions to the female fund were determined by actuaries who relied on mortality tables for the female population.

--The female fund required a woman to contribute approximately 15% more money each month than the male fund required of the women's male counterpart.

The respondents brought suit in the District Court for the Central District of California, complaining of the facts above and praying for equalization of rates of contribution for counterparts. The District Court granted a preliminary injunction equalizing rates of contribution, and the Court of Appeals for the Ninth Circuit affirmed.

SUMMARY OF THE ARGUMENT

As reflected in the retirement programs which it has created, Congress has defined equality in this context as the opportunity for male and female counterparts to receive equal monthly retirement benefits at equal cost to them. Men do not subsidize women in Congress's plans any more than shorter-lived persons subsidize longer-lived persons in any

insurance program. But the petitioner's plan disadvantaged women by requiring them to pay more for the same benefits.

Sex is not the only predictor of longevity. Even if it were, the petitioner could have spread the cost of longevity over the class of all employees (as Congress has) either by constructing a unisex mortality table or by assessing the cost of extra female longevity equally to all employees. By using sex both to measure and to spread the cost of longevity, the petitioner segregated its female employees and disadvantaged them because of their sex.

ARGUMENT

The issue in this case is the definition of equality of opportunity in the

context of retirement funds.[1] Because the total contributions paid into, and the total benefits paid out of, the petitioner's female retirement fund exceeded those of its male fund, the petitioner would define equality as the opportunity for the class of each sex to benefit from a fund in proportion to its contributions to the fund; that is, the ratio of contributions to benefits must be the same for each of two sex-segregated funds, regardless of the effect on the members' standards of living.[2] In contrast, the

---

[1] See Gold, "Equality of Opportunity in Retirement Funds," 9 Loy. L. A. Law Rev. 596 (1976).

[2] This definition includes the petitioner's plan, in which females paid a higher rate of contribution in order to receive equal monthly benefits, and actuarially equivalent plans in which females paid the same rate of contribution and received lower monthly benefits. Because this definition would be satisfied if there were no plan for one sex at all, or if one plan offered substantially lower benefits so

respondents define equality simply as the opportunity for a male and a female to receive equal monthly benefits from a retirement fund at equal cost to them; that is, to the extent that their employer is responsible for it, counterparts[3] are entitled to enjoy the same standard of living during their working years and during their retirement.

Which definition is correct? Are separate and unequal retirement funds permitted by Title VII of the Civil Rights Act of 1964? The best approach to it is to determine the intent of Congress.

---

[2](Continued) long as funding was proportionate to benefits, two provisos are necessary: there must be plans for each sex; and either contributions by counterparts must be the same, leading to disparate monthly benefits, or females' contributions must be higher, leading to equal monthly benefits.

[3]Counterparts are a male and a female who were born on the same date, entered the service of the employer on the same date, and had identical employment histories.

I. By deviating from Congress's definition of equality of opportunity in retirement funds, the petitioner disadvantaged female employees.

While there is little express legislative history on Congress's definition of equality of opportunity in the context of retirement funds, a colloquy between Senators Randolph and Humphrey is enlightening. The former mentioned that the Social Security System treats men and women differently in some respects and inquired whether similar differences in industrial benefit plans could continue under the bill which became Title VII; the latter answered affirmatively. 110 Cong. Rec. 13663-4 (1964). The Social Security System did not then, and it does not now, distinguish between male and female counterparts for purposes of employees' contributions to and

benefits from the Old-Age and Survivors and Disability Insurance trust funds. 42 USCA §§ 401(a) et seq. Men and women make equal contributions to the trust funds during their working years, and they receive equal monthly benefits from the funds during their retirement. If, which is likely, Congress believed the Social Security System treated men and women fairly and was a proper model for private retirement plans, it certainly did not intend to approve plans like the petitioner's, which result in unequal standards of living for counterparts.[4]

[4]The analogy between the Social Security System and the petitioner's plan is particularly compelling because of their similarity to each other and their difference from annuity contracts offered by insurance companies. In the case of an annuity contract, the policyholder pays the company a lump sum of money and, in return, the company pays him a smaller sum of money on a periodic basis until he dies. There is a direct correlation between the consideration which the policyholder pays for the annuity contract and the level of periodic benefits which the company returns. By

Another indication of Congress's definition of equality in retirement funds lies in the various other funds which it has created: for plainly Title VII was

[4](Continued) contrast, defined-benefit plans like the petitioner's base retirement benefits on length of service and final average compensation (see petitioner's brief at p. 4); a retiree's benefit is not calculated simply by taking the dollars in his account, adding interest, and spreading the total over his life expectancy. Thus, what Mr. Justice Harlan wrote of the Social Security System is equally true of the petitioner's plan: "eligibility for benefits, and the amount of such benefits, do not in any true sense depend on payment of taxes [or contributions], but rather on the earnings record of the primary beneficiary [the employee]." Flemming v. Nestor, 363 U.S. 603 at 609 (1960).

The similarity between the petitioner's plan and the Social Security System suggests an analogy to cases like Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) and Califano v. Goldfarb, 430 U.S. 199 (1977). The case at bar is not so extreme as the Social Security cases, for the respondents or their families were not deprived of benefits altogether; but it remains that women had to pay a higher price for benefits than their male counterparts had to pay. Because of the petitioner's discriminatory plan, the labor of women provided them with "less protection than [was] produced by the efforts of men." Califano v. Goldfarb, 51 L. Ed. 2d at 276.

not meant to upset existing retirement funds created by federal statute, and it is unlikely that Congress used one definition of equality in creating its plans and intended another definition to govern private funds. In addition to the Social Security trust funds, Congress has created the following retirement and disability funds:

--Civil Service Retirement and Disability Fund, 5 USCA §§ 8331 et seq.

--Central Intelligence Agency Retirement and Disability Fund, Pub. L. 88-643, 50 USCA § 403 note.

--Foreign Service Retirement and Disability Fund, 22 USCA §§ 1061 et seq.

--Railroad Retirement Account, 45 USCA §§ 231 et seq.

Consistent with the Social Security trusts, and different from the retirement plan of the petitioner, none of these federal funds segregates the sexes: none of them withholds higher contributions

from a female's check than from her male counterpart's, and all of them pay counterparts equal monthly benefits in retirement.

In addition to creating the retirement and disability funds listed above, Congress has provided for retirement benefits to be paid to the following classes of federal employees:

--armed forces personnel, 10 USCA §§ 1401 et seq.

--judges, 28 USCA §§ 371 et seq.

There are no deductions from the employees' paychecks, so male and female counterparts receive equal monthly benefits in retirement at equal monthly cost to them during their working years.

Thus, it has been the consistent practice of Congress, both in its provision for workers at large through the Social Security System and in its provision for federal employees through

trust funds and general-revenue obligations, to provide equal monthly retirement benefits to male and female counterparts at equal monthly cost to them. Neither the statutes creating the various federal retirement programs, nor their legislative histories, indicate Congress believed the female employees of government needed special treatement. Congress provided counterparts with equal monthly retirement benefits at equal monthly cost to them because that reflected its definition of equality of opportunity in the context of retirement systems. Nothing in Title VII or in its legislative history suggests that Congress intended a different standard to apply to private systems.

The effect of Congress's practice has been to spread the cost of human longevity over the class of all

employees. For a retirement fund is an insurance scheme designed to spread the risk or cost of longevity over a class of persons, and whoever would establish a fund must decide into which classes he will divide people. Initially, there are two possibilities: a single class of all persons, or a set of subclasses of persons. If subclasses are chosen, there is the further choice of which subclasses to use: one possibility is to define them according to immutable characteristics like race or sex; another possibility is to define them according to the degree of presence of factors known to affect longevity (e.g. use of alcohol and tobacco, obesity, family medical history, job stress, exercise, etc.) Whichever set of subclasses be chosen, the effect of the choice is to spread the cost of longevity of that subclass over that

subclass alone. But this was not the choice of Congress. Rather, Congress chose the class of all employees and spread the cost of human longevity over the universe of the entire labor force. It is inevitable, of course, that shorter-lived persons will "subsidize" the benefits of longer-lived persons: depending on the classifications chosen for analysis, men will subsidize women, blacks will subsidize whites, smokers will subsidize nonsmokers, etc. But there is no unlawful discrimination, not only because Congress said so, but also because nothing in the Constitution or in the Title VII gives an employee reason to complain of being classified as a person.

Of course, the petitioner's shibboleth and cudgel is that men should not subsidize the benefits of women.

(It is somehow indifferent to the fact that blacks are subsidizing the benefits of whites, smokers are subsidizing the benefits of nonsmokers, etc.) Evidently, Congress did not share the petitioner's belief. Congress believed that it was entirely proper to spread the risk of human longevity over the universe of all persons, regardless of sex, race, or any other factor. Some reasons why Congress thought as it did may be suggested.

First, unless funds are race-segregated as well as sex-segregated, blacks will subsidize the benefits of whites because blacks have a shorter life expectancy. (It may be the other way around, but it does not matter.) Congress believed, and quite properly so, that neither race nor sex is a proper classification for this or any other purpose of employment (unless, in the

case of sex, it is biologically necessary, as when a sperm donor or a wet nurse is needed).

Second, Congress may have had reference to unemployment insurance and workers' compensation plans, which do not distinguish between male and female employees, though one sex most certainly draws greater benefits and is "subsidized" by the other.

Third, Congress may have noted that men tend to earn higher income than women of like qualifications; this was the very reason for the Equal Pay Act, 29 USCA § 206(d), and probably a large part of the reason for Title VII itself. Taking this reality into account, Congress may have decided that, if men do subsidize benefits for women to some extent, the effect is the same as a progressive tax which falls more heavily on those better able to bear it.

Finally, Congress may have recognized that life expectancies are only averages that are not accurate as applied to individuals, particularly when only a single factor like sex is employed. Many females predecease their counterparts, and many others survive them by less than the average number of years -- with the result that, for these women, under plans like the petitioner's the female never catches up with her counterpart: she has paid more dollars in contributions, and she dies before she can recoup them in benefits. But this cannot happen in plans of Congress's creation, for it has defined equality in this context as the opportunity for each individual person to receive equal monthly retirement benefits at equal cost to him. Congress has decided that equality lies, not in treating a person as a member of a class

protected by Title VII, but in treating a person as an individual and guaranteeing him the same standard of living as any other person during his working years and during his retirement. This same emphasis on people's rights as individuals, not as members of classes, lies behind the emphasis on the individual in the language of §§ 703(a)(1) and (2).

It is clear, therefore, that the petitioner's sex-segregated retirement funds did not conform to Congress's definition of equality of opportunity in the context of retirement funds. By charging women a higher rate of contribution, the petitioner disadvantaged them by reducing their standard of living during the forty years of their working lives.[5] It now remains to determine

[5] Inspite of this plain deviation from the intent of Congress, the petitioner argues that

whether the petitioner disadvantaged the

[5] (Continued) its practice was approved by this Court in General Electric v. Gilbert, 429 U.S. 125 (1976). Yet the petitioner ignores a significant difference between Gilbert and its predecessor, Geduldig v. Aiello, 417 U.S. 484 (1974), on the one hand, and the case at bar, on the other. Geduldig and Gilbert held that an employer may exclude a risk from an insurance package; however, no risks were excluded from the petitioner's plan: indeed, there was only one risk, longevity, and it was fully covered because benefits were payable until death.

The troublesome class in Geduldig and Gilbert was composed of pregnant women; the effect of those cases is to allow an employer to leave the cost of pregnancy on pregnant women, rather than spreading this cost over the class of all employees. The effect of the petitioner's plan was quite different. The troublesome class was composed, not of women who are pregnant, but of women who outlive their male counterparts. If the petitioner's plan allocated the cost of benefits for such women -- approximately 16% of the class of women; see Henderson v. Oregon, 405 F. Supp. 1271 (D. Ore. 1975) -- to that class itself, this case would be analogous to Geduldig and Gilbert; in fact, however, the petitioner's plan allocated the cost of benefits for the "superannuated 16%" to the class of all women, as all women were assessed a higher rate of contribution in order to fund benefits for the few women who outlived their counterparts. There was no sex discrimination in Geduldig and Gilbert because both men and nonpregnant women were protected from the cost of benefits for pregnant women, and there would have been no sex discrimination in the case at bar if both men and shorter-lived women had been protected

respondents because of their sex.

II. By measuring and spreading the cost of longevity over sex-segregated classes, the petitioner disadvantaged its female employees because of their sex.

The petitioner claims it charged females higher contributions than their

---

[5](Continued) from the cost of extra female longevity. But there was sex discrimination in the case at bar because no women were protected from the cost of benefits for the few who outlived their counterparts, just as there would have been discrimination in Geduldig and Gilbert if the cost of pregnancy had been assessed, not to pregnant women only, but to all women -- and no men.

To have eliminated the discrimination in the case at bar, the petitioner would have had to protect both men and shorter-lived women from the cost of extra female longevity (as both men and nonpregnant women were protected from the cost of pregnancy) or to protect neither men nor women from this cost. The former alternative would have been possible (assuming the date of death of a given individual cannot be predicted with certainty) only by cutting off benefits for all retirees at the same age, which would have been undesirable. The latter alternative would have been possible simply by spreading the cost of extra female longevity over the class of all employees, which could have been achieved by any of the means discussed below at p. 28-30.

male counterparts because sex-segregated mortality tables reveal that, of the class of men and women aged 65 years, more women survive to age 66 than do men; more women survive to age 67 than do men; etc.: that is, the woman whose date of death coincides with the sum of the ages at death divided by the number of deaths for her sex -- the "average women" -- outlives the "average man." The petitioner asserts that it relied on sex-segregated tables because no others were available. Should this assertion prove false, the petitioner's sex bias would be clear, however widely it may have been shared.

And is not this assertion patently false? Whatever data were available to insurance companies were available to the petitioner's actuaries, and for many years insurance companies have based their decisions on whether to issue life and

annuity policies, and have adjusted their rates for these policies, by taking into account not only sex, but also various other factors which affect longevity, including use of alcohol and tobacco, obesity, family medical history, job stress, exercise, etc. Sex is one predictor of longevity, but there are others.[6]

Why did the petitioner choose sex instead of one of the other predictors, or a combination of them? Why did the petitioner segregate and classify its female employees to their disadvantage

[6]The life styles of women are changing. Increasingly, women are assuming roles in employment which were in the past reserved for men, and surely this effect was foreseeable to Congress, if it was not its very purpose, when it added the sex clause to Title VII. It can be expected, therefore, that sex will decrease in importance as a predictor of longevity, and it is not unreasonable to suppose that Congress could have foreseen this possibility as well.

in violation of the clear language of § 703(a)(2)? If it claims the reason was administrative convenience, it must be admitted that sex-segregated mortality tables were easy to use, much easier than treating employees as individuals, some of whom drink alcohol, smoke tobacco, are overweight, have high blood pressure, do stressful work, or are female. But this Court has never allowed administrative convenience to stand as justification for unlawful discrimination. Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). As the Court has written:

> "[A]ny statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . . .' Reed v. Reed 404 U.S. at 77." Frontiero v. Richardson, 411 U.S. 677 at 690 (1973).

Surely Congress intended to afford women at least as much protection from sex discrimination in employment as the Constitution affords them from discrimination in other areas. But when the the petitioner classified its employees according to sex in order to predict their longevity, studiously ignoring every other relevant classification which also predicted longevity, it unlawfully discriminated against its female employees because of their sex.[7]

The petitioner argues that it charged women higher contributions, not because

[7] It may be argued that there is no end to the number of factors which affect longevity, yet there must be an end to the number of factors considered in funding a retirement plan. But this argument does not advance the petitioner's case because the answer is not to rely exclusively on a factor which is a classification prohibited by Title VII; the answer is simply to ignore all such factors and use a unisex mortality table.

they were women, but because they outlive men. The availability of predictors of longevity besides sex conclusively answers this argument, for non-smokers outlive smokers, etc., and the petitioner did not assess these persons higher contributions. The legislative history of Title VII is an additional answer. An amendment was offered which would have limited the protection from sex discrimination to discrimination based solely on sex. The amendment was defeated. 110 Cong. Rec. 2728. Neither sex itself, nor a characteristic which might be associated with sex, may lawfully be the basis of an employment decision. Congress knew that sex is an involuntary and immutable characteristic, and it prohibited employers from disadvantaging individual women because of a characteristic of the class (longevity) which

might be -- but generally is not -- true of them as individuals.

The petitioner argues that it used sex-segregated mortality tables because there was no alternative way accurately to measure the longevity of its employees and fund their retirement benefits. This argument fails on two counts, for it is not only simply wrong but, even if it is right, it ignores the difference between measuring a cost and funding that cost.

It is wrong to argue that sex-segregated mortality tables were the only way accurately to measure longevity because any employer with a work force the size of the petitioner's could easily have constructed a unisex mortality table applicable to itself by determining the ratio of its male-to-female employees and extrapolating from sex-segregated tables. Once such a table was constructed

(of course, it could have been modified from time to time to reflect changes in the composition of the work force), it could have been used to predict longevity with as much accuracy as the sex-segregated tables on which it was based, and it could also have been used to determine equal contributions from male and female counterparts to the retirement fund.

The argument that only sex-segregated mortality tables were available fails on a second count because, assuming a unisex table could not have been constructed, there remained the fundamental difference between measuring a cost and funding that cost. Even if sex-segregated mortality tables were absolutely necessary <u>to predict</u> longevity, and from it the costs of future retirement benefits, such tables <u>did not dictate</u> that females had to

contribute more than males. Employee contributions to the fund could have been set, in the first instance, by reference to male mortality tables; then, any shortfall in funding could have been supplied directly by the petitioner or could have been assessed in equal shares to counterparts. Either way, the petitioner's plan would have remained actuarially sound.[8]

The petitioner discriminated against women by segregating them into a separate class from men. The petitioner could have used a discrete number of factors to define the classes over which it measured and spread the cost of longevity; men and women, blacks and whites, et al. would

[8] In other words, the petitioner has always been able to spread the cost of longevity over the class of all employees. Indeed, that is its present practice, as required by Cal. Gov. Code § 7500.

have been mixed throughout these classes, and there would have been no discrimination. The petitioner could have used all possible factors for measuring and spreading the cost of longevity by constructing a unisex mortality table; each person would have been treated, not as a member of a class, but as a human being, equally suseptible to the various influences on longevity, and no one would have had reason to complain. Or the petitioner could have relied on sex-segregated mortality tables to predict the cost of longevity and, once the cost was known, spread that cost equally over the class of all employees; again, each person would have been in the same position as any other person. But the petitioner did none of these. Ignoring Congress's example of equality in retirement funds, the petitioner utilized sex both as the

only predictor of longevity and as the basis for funding its segregated retirement plans. That insurance companies are guilty of the same discrimination is no excuse for the petitioner; sex discrimination in America is old and deep, but Title VII meant to end it in the field of employment. A simpler case of sex discrimination cannot be imagined: the petitioner segregated women into a separate class from men, and it broke the law.

CONCLUSION

It would be a strange anomaly if this Court should say to the respondents herein: "When Congress created the Social Security System, it intended for you and your male counterpart to enjoy the same standard of living during your working

years and during your retirement. When Congress passed the Equal Pay Act, it intended to guarantee that your employer would not force you to accept a lower standard of living than he provided your counterpart. When Congress provided for the retirement of civil servants, it observed these principles by offering counterparts equal standards of living during their retirement at equal cost to them during their working years. But when it passed the Civil Rights Act, Congress undid much of what it had previously done, for it intended to allow the petitioner to charge you a higher rate of contribution to the retirement fund, and relegate you to a lower standard of living than your counterparts, during the forty years of your working lives."

For these reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Michael Evan Gold
Fred Okrand
Jill Jakes

Attorneys for Amicus Curiae,
ACLU Foundation of Southern
California

December, 1977.

FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, ET AL.,

Petitioners,

v.

MARIE MANHART, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN NURSES' ASSOCIATION, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

JONATHAN R. HARKAVY
704 Southeastern Bldg.
Greensboro, N. C. 27401

Attorney for American Nurses' Association

Of Counsel:

EDWARD M. KRISS
American Nurses' Association
2420 Pershing Road
Kansas City, Mo. 64108

NAHOMI HARKAVY
Smith, Patterson, Follin, Curtis, James & Harkavy
704 Southeastern Bldg.
Greensboro, N. C. 27401

SUBJECT INDEX

	Page
Table of Citations	i
Interest of the Amicus Curiae	1
Position of the Amicus Curiae	3
The Setting of these Unlawful Employment Practices	4
Summary of Argument	18
Argument: Retirement plans which provide lower benefits to or impose higher costs upon female employees by reference to mortality tables which single out sex, among all factors associated with longevity, as a conclusive determinant of benefits and costs violate §703(a) of Title VII.	20
A. Longevity tables which single out sex, among all characteristics of longevity, as a conclusive determinant of costs and benefits discriminate because of sex.	20
B. Title VII proscribes the use of sex, among all factors associated with longevity, as a conclusive	

determinant of the benefits and costs of retirement plans. 20

C. Title VII proscribes any requirement that all female employees - and females alone - pay the costs of providing to females the same protection which males receive against the risk of longevity. 39

Conclusion 50

TABLE OF CITATIONS

Cases

	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	34
American Nurses' Ass'n v. TIAA-CREF, No. C-75-558-G (M.D.N.C.)	2,3
General Electric Co. v. Gilbert, 429 U.S. 125 (1976)	passim
Griggs v. Duke Power Co., 401 U.S. 431 (1971)	34,42
Henderson v. Oregon, 405 F.Supp. 1271 (D.Ore. 1975)	17,40
Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir.) cert. denied 336 U.S. 960 (1949)	9
Manhart v. City of Los Angeles, 553 F.2d 581 (9th Cir. 1976)	27,34,40
Nashville Gas Co. v. Satty, 46 U.S.L.W. 4026 (U.S. December 6, 1977)	passim

	Page
Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971)	35
Reilly v. Robertson, ___ Ind. ____, 13 EPD ¶1126 (1977)	40
Robinson v. Lorillard Corp. 444 F.2d 791 (4th Cir.) cert. denied 404 U.S. 1006 (1971)	42
Spirt v. TIAA, No. 74 Civ. 1674 (S.D.N.Y.)	46
Taylor v. Goodyear Tire & Rubber Co., 6 FEP Cases 50 (M.D.Ala 1972)	42-44
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	37,38
Washington v. Davis, 426 U.S. 229 (1976)	37
Women in City Gov't United v. The City of New York, No. 75 Civ. 2868 (S.D.N.Y.)	16,27,45

Statutes

Age Discrimination in Employment Act of 1967, 81 Stat. 602 (1967), 29 U.S.C. §621 et seq.	4,10
Employee Retirement Income Security Act of 1974, 88 Stat. 832 (1974), 29 U.S.C. §1001 et seq.	10
Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e et seq.	passim

Administrative Authorities

29 C.F.R. 1604.9(f)	42
EEOC Dec. No. 75-146 (January 13, 1975)	42

Textbooks and Other Authorities

B. Bergmann and M. Gray, Equality in Retirement Benefits, Civil Rights Digest 25-27 (Fall 1975)	17,30
H. Denenberg, R. Eilers, J. Melone, R. Zelten, Risk and	

	Page
Insurance (3rd ed. 1974)	11,12,17
H. Gershenson, Measurement of Mortality (1961)	6,14
M. Gold, Equality of Opportunity in Retirement Funds, 9 Loyola of L.A. L.Rev. 596 (1976)	15,36
D. Gregg and V. Lucas, Life and Health Insurance Handbook (3rd ed. 1973)	7-8,11
D. Halperin, Should Pension Benefits Depend on the Sex of the Recipient? 63 AAUP Bull. 43 (1976)	16
B. Lautzenheiser, Sex and the Single Table: Equal Monthly Retirement Income for the Sexes? Employment Benefits Journal (Fall 1976)	49
B. Lautzenheiser, "Sex and the Single Table Revisited", Actuary No. 7 (Sept. 1977)	50
Lewis & Lewis, The Potential Impact of Sexual Equality on	

	Page
Health, 297 New England J. Med. 863 (1977)	16,29
U.S. Fact Book (1977) Chart No. 85	9
The New York Times, "Longevity in Hawaii is Nation's Longest" (Dec. 15 1977)	28
Interim Report on Equal Periodic Pension Benefits for Men and Women, 62 AAUP Bull. 339 (1976)	31
Note, Sex Discrimination and Sex-Based Mortality Tables, 55 Bost. U.L. Rev. 624 (1973)	9,28,29
The Supreme Court, 1976 Term, 91 Harv. L.Rev. 1, 247-50 (1977)	22,24

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, ET AL.,
Petitioners,

v.

MARIE MANHART, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN NURSES' ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

American Nurses' Association ("ANA") submits this brief as amicus curiae in support of the respondents.* The brief demonstrates: (i) that the selection of sex, among all factors associated with longevity, as a conclusive determinant of the benefits and costs of retirement plans, is discrimination because of sex; (ii) that Title VII of the Civil Rights Act of 1964 proscribes such discrimination; and (iii) that requiring all female employees (and females alone) to pay the costs of providing to females the same protection which male employees receive against the risk of longevity is not permitted by Title VII of the Civil Rights Act of 1964.

INTEREST OF THE AMICUS CURIAE

ANA is the nation's largest professional organization of registered nurses. It has approximately 200,000 members belonging to constituent state nurses' associations in the fifty states, the District of Columbia, the Virgin Islands and Guam. ANA's purposes are to foster higher standards of nursing practice, to promote the professional and educational advancement of nurses, and to promote the economic and general welfare of nurses to the end that all people may have better nursing care.

---

* Pursuant to Supreme Court Rule 42(2), this brief is accompanied by the written consent of all the parties to this case and is being presented for filing within the time allowed for the filing of the respondents' brief.

ANA is strongly committed to the eradication of all forms of discrimination on the basis of race, sex, and other arbitrary classifications, particularly in the field of nursing care. ANA has participated frequently in judicial proceedings involving matters of concern to its membership. As a member of CAPE, the Coalition of American Public Employees, ANA has also addressed issues before this Court concerning public employees.

Many of ANA's members are affected by retirement plans which discriminate on the basis of sex in either employee contributions or benefits. A great number of ANA members are covered by plans of the Teachers Insurance And Annuity Association of America and College Retirement Equities Fund ("TIAA-CREF") at hospitals and nursing educational institutions affiliated with public and private universities and colleges. The TIAA-CREF plans, which generally provide lower monthly benefits to women, are the subject of much sex discrimination litigation, including American Nurses' Ass'n v. TIAA-CREF, No. C-75-558-G (M.D.N.C.).

For the past few years ANA has devoted considerable attention to the issues underlying the case at bar. In 1973 ANA filed nine charges of discrimination in various district offices of the Equal Employment Opportunity Commission ("EEOC") throughout

the nation. After the EEOC determined that the TIAA-CREF plan at The University of North Carolina discriminated because of sex, ANA commenced litigation to enjoin the discrimination. The ANA case is presently stayed pending disposition by this Court of the case at bar. American Nurses' Ass'n v. TIAA-CREF, supra.

What the Court does in the present case, therefore, is a matter of vital concern to ANA and its members throughout this country. ANA therefore sets forth its views on what it considers to be several important issues before the Court in this case. This brief does not treat the statutory defense based upon §703(h) of Title VII of the Civil Rights Act of 1964, any other defense raised in the case at bar and the applicability of other statutes and constitutional provisions to the conduct at issue here.

POSITION OF THE AMICUS CURIAE

This case presents a serious question of sex discrimination against women who work: Does Title VII of the Civil Rights Act of 1964[1] permit an employer to compensate its female employees less favorably than its male employees (by providing lower

[1] 78 Stat. 253, as amended by the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§2000e et seq. (hereinafter "Title VII").

BEST COPY AVAILABLE

periodic benefit payments to females or by requiring of females higher contributions for equal periodic benefit payments) solely by reference to mortality tables which exclude all determinants of longevity other than sex? We submit that the answer to this question is "no" under §703(a)(1) of Title VII and that the Court should take this opportunity to clarify the application of Title VII to retirement plans which limit their cost and benefit determinants to sex[2] and which require all female participants (and only females) to pay the cost of providing equivalent insurance coverage to males and females against the risk of longevity.

THE SETTING OF THESE UNLAWFUL EMPLOYMENT PRACTICES

Retirement plans providing for lifetime annuities to participants insure against the risk of longevity by deferring compensation to the retirement years. The impropriety of using longevity (or mortality) tables which exclude consideration of all factors associated with longevity other than

[2] No one disputes the propriety of using age in computing these benefits and contributions. See 29 U.S.C. §623(f)(2). We therefore sometimes refer herein to sex as being the exclusive determinant of costs and benefits of the plans at issue.

sex is highlighted by the following historical description of insurance against longevity.

1. Description of the Retirement Plans.

The "defined benefit" plan at issue in this case is but one variant of the retirement plans which discriminate against women. In the plan at bar, all employees of the defendant receive equal monthly payments of deferred benefits based upon their years of service and salary levels. The cost of providing these benefits is calculated by reference to tables of expected longevity. Because these tables exclude every determinant of longevity other than sex and because the tables (calibrated solely on sex) tend to show that women, as a class, live longer than men, as a class, actuaries have determined that it costs more to provide the defined benefits to women, as a class, than to men, as a class. Upon the basis of this actuarial "conclusion" the defendant requires women, and women alone, to fund these presumed additional costs by making women contribute from their wages approximately 15% more to the defendant's plan than their male counterparts.

The plan which is prevalent among ANA members is a variant of the "defined

contribution" plan.[3] Under this plan contributions are made at equal rates by and on behalf of all participating employees, regardless of sex. Female participants, however, receive substantially lower monthly retirement benefits solely because the benefits are calculated by reference to longevity tables limited to only one factor associated with longevity: sex.

The two foregoing plans are illustrative of the many variants of defined benefit and defined contribution plans in use today to provide deferred compensation to our nation's workforce. The common discriminatory element of all these plans is the conclusive reliance upon tables of expected longevity which are calibrated to consider only sex as a determinant of longevity, despite reliable professional judgment that where "appreciable differences" in mortality "might materialize," those differences should be factored into consideration.[4]

---

[3] Brief of TIAA-CREF, p. 2. The TIAA-CREF plan covers nearly 500,000 persons in over 85% of private four year colleges and universities and 40% of all such public institutions.

[4] H. Gershenson, Measurement of Mortality, p. 153 (1961).

2. The Growth of Retirement Plans as an Element of Employee Compensation.

The history of retirement plans is instructive and accounts for the focus of the defendants and their supporting amici curiae on a narrow range of hypothetical actuarial considerations alone. Pensions originated as purely discretionary gratuities which an employer settled upon selected employees as rewards for long and loyal service to the employer.[5] These pensions were not regarded as a form of compensation, and they existed outside the ambit of the contract between master and servant. Indeed, they were an important element of discouraging collective activity and an acceptable means of encouraging older workers out of the workforce.

The predominant modern notion underlying annuities is the "deferred wage" concept, which is said to be the foundation for the TIAA-CREF plans. D. Gregg and V. Lucas, infra n. 5 at pp. 518, 608-09. This concept holds that in order to provide for the increasingly significant risk of longevity,[6] employees are willing to defer a portion of their compensation to their retirement years by purchasing annuities.

---

[5] D. Gregg and V. Lucas, Life and Health Insurance Handbook, 516-17 (3d ed. 1973).

[6] Infra, n. 8 and text.

The point of this historical resume is to emphasize that funding of an employee's retirement years is no longer a gratuity which the employee hopes for from a benevolent employer; rather, retirement funding by deferring current earnings is a key element of modern employee compensation. The costs of providing equal benefits to all employees is an element of overhead which may not lawfully be borne disproportionately by females, as the defendants and the insurance industry amici curiae[7] would have it.

3. Increased Longevity and the Need for Retirement Benefits.

Several insurance industry experts have frankly admitted that the increase in longevity which this nation is presently experiencing is a "recent and dramatic development" that we do not yet fully appreciate.[8] The recent phenomenon

[7] E.g., Brief of American Council of Life Insurance, pp. 42-49.

[8] D. Gregg and V. Lucas, supra n. 5. at pp. 513-18. The increase in longevity - mainly due to decreased mortality at younger ages - is startling indeed. In 1920 the expectation of longevity at birth was 54.1 years, a full decade short of "normal retirement"; by 1940 the expectation was 62.9 years; by 1970 the

of life expectancy past normal working ages has, as noted before, translated into the growth of retirement plans as a mode of compensation. Employees no longer regard retirement benefits as a gift. It is accepted that employees are currently working not only for current wages, but also for a level of benefits necessary to fund their needs through the end of their lives. Labor unions were quick to recognize the phenomenon of increased longevity by arguing successfully for the inclusion of retirement benefit plans in the mandatory subjects of collective bargaining.[9] More recently, Congress recognized the increase in the risk of longevity by two pieces of legislation designed

[8] Cont'd
expectation had climbed to 70.9 years and in 1974, the latest reported year, the expectation was 71.9 years, approximately 7 years past "normal retirement." U.S. Fact Book (1977), Chart no. 85, p. 60 [Source: U.S. Nat. Center for Health Statistics, Vital Statistics of the United States, annual].

[9] Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir.) cert. denied 336 U.S. 960 (1949). See generally, Note, Sex Discrimination and Sex-Based Mortality Tables, 55 Bost. U.L.Rev. 624, 631, nn. 48-50 and text (1973).

to deal with longevity in employment[10] and longevity in retirement.[11] In both cases Congress specifically adverted to the problems of longevity and the financial and other risks attendant to the phenomenon of a society with a dramatically increasing older population. And in the latter case Congress specifically sought to protect the "well being and security of millions of employees and their dependents [who] are directly affected by these [employee benefit] plans" by requiring the plans, inter alia, to meet minimum vesting, funding, disclosure and termination standards. 29 U.S.C. §1001(a)-(c).

The needs of those employees who do outlive their earning age must be underscored in considering insurance against the risk of longevity. Insurance experts themselves candidly forsake the notion that retired persons can get along on

---

10 Age Discrimination in Employment Act of 1967, 81 Stat. 602 (1967), 29 U.S.C. §621.

11 Employee Retirement Income Security Act of 1974, 88 Stat. 832 (1974), 29 U.S.C. §1001.

substantially reduced incomes.[12] They point out that social pressures discourage substantial changes in lifestyles; that families are soon drawn apart in our mobile society and that parents do not move to their children's homes as often as in the past; and that the fixed costs of living are generally not reduced as much as most think when one leaves the workforce. Moreover, the experts note that the modern trend in social thinking is that retired persons should not be expected to suffer a much lower standard of living as a penalty for being out of the workforce. See H. Denenberg, et al., infra, n. 12.

In business terms the high fixed costs of doing business as a human being in a complex, highly regulated urban society means that employees whose retirement funds do not meet their needs are virtually committed to a poorer and meaner existence. To accept the defendants' and the industry's arguments for exempting retirement benefits and costs from Title VII would either make the poorer group disproportionately female or burden all female employees disproportionately

---

12 H. Denenberg, R. Eilers, J. Melone, R. Zelten, Risk and Insurance, pp. 283-84 (3d ed. 1974); D. Gregg and V. Lucas, supra n. 5, at p. 514.

with the additional costs of providing benefits to a small group of the longest lived employees.

4. Meeting the Risk of Longevity.

The principal ways of meeting the risk of longevity are: (i) income from employment; (ii) income from investments (savings, securities and the like); (iii) governmental aid and insurance and (iv) pension planning. As Congress noted in its findings attendant to age discrimination legislation, employment opportunities for older citizens are, to be charitable, limited. Supra, n. 10. Investment income from savings and otherwise is, for most retired employees, insufficient even for a subsistence way of life. H. Denenberg, et al., supra n. 12 at p. 285. Governmental insurance is plainly insubstantial for most people, as the constant pressure on the Social Security system attests. Other governmental transfers would involve the social welfare systems of federal and state governments and would place an even greater burden on systems already operating at "peak load."

For working people, therefore, a form of insurance against longevity is a material help in enhancing their economic security. The manner in which the insurance industry, the actuarial profession and private and public employees have met the demand for insurance against longevity helps to explain the nature of the Title

VII violations which inhere in retirement plans based on single determinant longevity tables.

5. The Response to the Demand for Retirement Plans to Defer Income.

In the plans discussed here, the determination of benefits in a defined contribution plan and the determination of costs in a defined benefit plan are made by reference to mortality tables which differentiate solely by sex in assessing the risk of longevity. All factors associated with the risk of longevity - except sex - are knowingly excluded from consideration. We show here that the exclusion of all determinants but sex is out of step with the insurance industry's own standard practices in assessing risks to be insured against.

As TIAA-CREF and other amici curiae have stressed at great length, insurance against longevity is premised on groups exhibiting the same degree of risk. These industry representatives also stress that the fundamental baseline of risk classification (as a means of determining costs and benefits) is to group the insureds "on the basis of risk factors which are significant, statistically measurable and directly related to the expected risk of loss." Brief of

TIAA and CREF, p. 6. This view of risk classification is consistent with expert actuarial opinion which holds that ". . . the classes [of lives] entering the study should be similar in character and composition to the classes which will be assumed to be subject to the resulting rates" and that if "appreciable differences" in mortality "might materialize," it is sound actuarial practice to study the groups separately. H. Gershenson, supra n. 5 at p. 153.

While recognizing that appropriate grouping is an accepted means of risk classification, both the defendants and the insurance industry representatives fail to come to grips with the ultimate question of the selection of groups. For example, Gersheson holds that "characteristic mortality differences" are found among various regions of residence of prospective annuitants. Supra, n. 5 at p. 154. The same author, in noting that the interpretation of mortality statistics is "beset with many pitfalls", says that misleading conclusions may be drawn from a universe of insureds who are not segregated by locality and economic class. Id., at p. 171. On the question of selecting risk determinants, therefore, the proponents of sex-segregated longevity tables are content to ignore the expert opinion of their own

profession.

The proponents of single determinant tables also ignore such unambiguous factors bearing upon longevity as smoking, drinking and eating. A recent scholarly work has phrased the issue starkly:

> "Smokers die before non-smokers. Obese persons die before slender persons. Alcoholics die before teatotalers. These facts are not speculation. Insurance companies refuse to issue policies to such persons, or adjust the premiums, or exclude related risks from coverage. Yet retirement funds uniformly ignore use of alcohol, tobacco, and obesity. Instead, they choose the one characteristic which applies to women alone, longevity. Do they treat women differently only because of their longevity, or have they chosen longevity because it applies only to women?" M. Gold, Equality of Opportunity In Retirement Funds, 9 Loyola of L.A. L. Rev. 596, 625 (1976).

The relevance of personal habits can be as much a determinant of longevity as gender. For instance, it has recently been noted that smoking affects longevity at age 65 almost as much as gender. The life expectancy of a 65 year old male who has never

smoked exceeds that of a heavy smoker by nearly three and one-half years. U.S. Public Health Service, Health Consequences of Smoking (1968 Supp.) quoted in D. Halperin, Should Pension Benefits Depend on The Sex of The Recipient?, 63 AAUP Bull. 43, 45, n. 15 (1976).

Given the body of knowledge about longevity available to the proponents of sex-based mortality tables,[13] it is clear that the selection of sex from among all the determinants of longevity in constructing annuity mortality tables is irrational, arbitrary and inconsistent with normal insurance practices. This singling out of sex as a conclusively presumptive determinant of costs and benefits is inconsistent with the care with which the insurance industry purports to assess risks. Indeed, it is only when there is no further opportunity for learning about the risk involved that the insurance industry turns to pooling of risks as a means of spreading the risks among the widest group of persons

[13] E.g., Lewis & Lewis, The Potential Impact of Sexual Equality on Health, 297 New England J. Med. 863 (1977); Women in City Gov't United v. The City of New York, No. 75 Civ. 2868 (S.D.N.Y.) (Amended answers to requests for admissions, ¶10).

possible.[14] In the case of longevity -- a risk which we have demonstrated is a recent phenomenon -- the insurance industry simply has not followed its usual practice of studying the risk and determining costs and benefits by reference to all appreciable factors associated with longevity. Instead, it has singled out sex to the disadvantage of most females who do not possess the characteristic of a long life expectancy.[15]

[14] H. Denenberg, et al., supra n. 12 at pp. 9 et seq.

[15] Henderson v. Oregon, 405 F.Supp. 1271 (D.Ore. 1975) (appeal pending); see generally, B. Bergmann and M. Gray, Equality in Retirement Benefits, Civil Rights Digest 25-27 (Fall 1975).

SUMMARY OF ARGUMENT

The measurement of employee benefits and costs by reference to mortality tables which differentiate only on the basis of sex is sex discrimination within the meaning of Title VII. Recent decisions of this Court require a finding of sex discrimination whenever men and women are treated differently with regard to insurance against the same risks. In this case, men are treated more favorably than women with respect to insurance against the risk of longevity because the benefits and costs of longevity insurance plans are determined on the basis of sex alone, despite a considerable body of knowledge concerning factors associated with life expectancy and despite the fact that sex is actuarially related to longevity only in a small portion of the population.

Section 703(a)(1) of Title VII literally prohibits disparate coverage against the risks of longevity on the basis of sex where such coverage is a part of compensation. Retirement plans discriminate on their face when they admittedly contemplate gender-based distinctions in benefits and costs. The plans also discriminate against women in effect by providing lower periodic benefits to women or by requiring women to make greater contributions than males in order to receive equal periodic benefits. In addition, these retirement plans on their face and by their history indicate

that the distinctions in benefits and costs based on gender are purposeful and intentional.

To the extent that the longevity of a small segment of the female population will require an increase in the cost of insuring females and males on the same basis, Title VII does not permit the imposition of the added costs upon all females and only females. In the absence of added employer contributions, it is both equitable and feasible to spread the marginal cost of insuring against the longevity of a small percentage of females among all employees in an employer's workforce.

ARGUMENT

RETIREMENT PLANS WHICH PROVIDE LOWER BENEFITS TO OR IMPOSE HIGHER COSTS UPON FEMALE EMPLOYEES BY REFERENCE TO MORTALITY TABLES WHICH SINGLE OUT SEX, AMONG ALL FACTORS ASSOCIATED WITH LONGEVITY, AS A CONCLUSIVE DETERMINANT OF BENEFITS AND COSTS VIOLATE §703(a) OF TITLE VII.

We direct our argument first, to the notion that use of sex-based tables is not sex discrimination within the meaning of §703(a); second, to the notion that Title VII permits some sex discrimination in retirement benefits and costs; and third, to the notion that the cost of providing equal risk coverage to women should be borne by women alone.

A. Longevity tables which single out sex, among all characteristics of longevity, as a conclusive determinant of costs and benefits discriminate because of sex.

The primary argument of proponents of sex-based longevity tables is that distinctions between males and females based

upon life expectancy are not distinctions on account of sex.[16] Neither prevailing authority nor the facts themselves support this argument for a special exemption from Title VII.

This Court has not, until the present case, addressed insurance cost and benefit differentials based solely upon sex. On two recent occasions, however, this Court has set forth the proper considerations in determining what distinctions are distinctions because of sex. In General Electric Co. v. Gilbert, 429 U.S. 125 (1976), the Court held that the exclusion of the risk of pregnancy from a disability insurance program is not gender-based discrimination. The Court looked to the selection of risks insured by the benefit program and found that males and females were accorded equivalent protection from the risks selected by the employer for insurance. The Court concluded that the employer's failure to include pregnancy among the insured risks does not constitute sex discrimination because the risk protection for the employees was equal between males and females. The Court reasoned:

> ". . . Gender-based discrimination does not result simply because an employer's disability benefits plan is less

[16] Brief of American Council of Life Insurance, p. 6.

than all-inclusive. For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially even-handed inclusion of risks." 429 U.S. at 138-140.

Retirement plans are on a wholly different footing. Here the employer agrees to insure males and females against the same risk (longevity) and there is no question of including "an additional risk, unique to women" in the retirement plan. 429 U.S. at 140. Gilbert, therefore, does not control this case nor does it stand for the proposition that actuarial distinctions are not distinctions based upon sex. Indeed, Gilbert strongly suggests affirmance of the case at bar on the ground that a clear gender line has been drawn here which forces women to pay more for insurance against the same risk (or, conversely, to suffer lesser coverage against the risk).[17]

[17] The Supreme Court, 1976 Term, 91 Harv. L. Rev. 1, 247-250 (1977).

More recently, the Court held that an employer's policy of denying accumulated seniority to females returning from pregnancy leave violates §703(a) because it burdens females in a manner which deprives them of employment opportunities because of their sex. Nashville Gas Company v. Satty, 46 U.S. L.W. 4026 (U.S. December 6, 1977). With respect to accumulated seniority, the Court emphasized the precise rationale of Gilbert that under §703(a)(1) an employer need not confer additional benefits upon women by insuring them against an additional risk. Instead, the Court found that the denial of accumulated seniority was a substantial burden imposed on women alone which deprived them of employment opportunities in violation of §703(a)(2). 46 U.S.L.W. at pp. 4027-28. With respect to the employer's policy of denying sick-leave pay to pregnant employees, the Court found Gilbert "legally indistinguishable" and remanded the case for consideration under §703(a)(1) of the theory that denial of sick leave pay in the circumstances was a pretext designed to discriminate because of sex.

The point of Gilbert and Satty for present purposes is that the Court has expressly refused to rule, as the insurance industry would have it do, that the presence of hypothetical equality in actuarial terms automatically

exempts retirement plans from Title VII coverage. Rather, the Court has suggested, both in Gilbert and Satty, that disparate coverage for each sex against the same risk constitutes discrimination because of sex.[18]

Just as the foregoing cases make clear that this Court has not ruled that longevity "can constitute a basis for differentiation between male and female

[18] General Electric Co. v. Gilbert, 429 U.S. at 138-40 (1976); Nashville Gas Company v. Satty, 46 U.S.L.W. at 4027-28 and 4030-31, n. 6. See also 91 Harv.L.Rev. supra n. 17 at 248 ("Women or minorities, in other words, will determine whether they are receiving equal benefits by comparing the extent to which they are protected against certain risks with the degree to which males or whites are protected against the same or analogous risks . . . Justice Rehnquist found that [the plan in Gilbert] avoided compensating one group for a risk while failing to provide equivalent compensation to the other for an analogous risk.")

employees, without constituting sex discrimination",[21] important facts concerning human longevity demonstrate that the Court should not so rule. Indeed, we note that not even TIAA-CREF, a vigorous proponent of sexually dual mortality tables, appears to take the extreme position that distinctions in longevity, when computed without reference to any known characteristic of longevity except sex, can never constitute discrimination because of sex.[22]

[21] Brief for American Council of Life Insurance, pp. 6-7.

[22] TIAA-CREF simply argues that Title VII permits the recognition of male-female longevity differences in computing costs and benefits of retirement plans. That argument, while less extreme than the position of the American Council of Life Insurance, still fails to come to grips with the importance of the discriminatory selection of characteristics in constructing the longevity tables.

What makes distinctions based on longevity distinctions because of sex in the context of the retirement plans in issue is the selection of sex as the exclusive determinant of the costs and benefits of risk coverage. When using any device to compute the costs and benefits of deferred compensation retirement plans, employers are obliged to treat males and females, blacks and whites and other protected and non-protected groups alike. Where there is a substantial body of knowledge available concerning human longevity, it cannot be said that the selection of sex as the exclusive means of determining costs and benefits of retirement plans is not discriminatory because of sex. Indeed, in order for the tables to distinguish on account of longevity alone, all of the measurable and appreciable determinants of longevity would have to be factored into the tables. The exclusion of all characteristics of longevity other than sex, and the inclusion of sex alone, demonstrates that the mortality tables at issue distinguish on account of sex and not on account of longevity.

The factors other than sex which determine human longevity, and which can be and have been measured with a significant degree of accuracy, were brought to the attention of the court below in this case and resulted in the following

unassailable logic:

> "How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a whole, longevity, and disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that the difference is not based on sex is to play with words." 553 F.2d 581, 593 (1976).

Lest there be any doubt that factors other than sex determine human longevity, one need only refer to evidence taken from proponents of sex-based tables themselves: "Human longevity, mortality and life expectancy show a statistical correlation to socio-economic status, occupation, medical history, marital status, heredity and status as a smoker or non-smoker." Women In City Government United v. The City of New York, No. 75 Civ. 2868 (S.D.N.Y.) (Defendants' amended answers to requests for admissions, ¶10). Even in this case, the American Council of Life Insurance has told this Court that social habits and environmental

factors are "relevant in predicting [an] applicant's life expectancy" and that using those factors would "refine" the prediction of life expectancy without converting it into a certainty.[23] This concession about the relevance of "social habits" and "environmental factors" is significant, for it indicates that sex has been selected as the conclusive determinant either arbitrarily or merely for reasons of administrative convenience and economy.[24] The universal agreement that numerous factors influence longevity is, quite simply, pregnant with the ultimate conclusion that tables which use only sex to determine longevity are tables which distinguish on the basis of sex in their results.

---

[23] Brief of American Council of Life Insurance, p. 18 at n. 36.

[24] The admission by industry representatives that numerous factors influence longevity need not end the inquiry into this matter. There is available to this Court, as there has been available to the insurance industry itself, a detailed body of knowledge concerning human life expectancy and its determinants. Secondary sources of information are collected in Note, Sex Discrimination and Sex-Based Mortality Tables, 53 Boston U.L.Rev. 624, 626-628, nn. 12-20 and text (1973); see also "Longevity in Hawaii is Nation's Longest," The New York Times, p. A22 (Dec. 15, 1977).

Recent changes in the relative importance among characteristics of human longevity must also be taken into account. For example, present actuarial data limited to considerations of sex are, most probably, inaccurate because of the changing work and life patterns of our society. The increase of women in high stress jobs renders suspect the actuarial prediction that women as a class will live longer than men as a class in a discrimination-free employment environment. See Lewis & Lewis, The Potential Impact of Sexual Equality on Health, 297 New England J.Med. 863 (1977). See also Note, 53 Bost. U.L.Rev., supra at n. 2 (1973). A broad ruling by this Court exempting from Title VII retirement plans which differentiate on the basis of sex would be inconsistent with the mandate of Title VII to provide women with an equal opportunity to enjoy the benefits of the more attractive job positions in our nation's workforce.

In deciding whether distinctions based on present mortality tables are distinctions because of sex the Court should also take a close look at the relationship between sex and longevity.

The relationship between sex and longevity has been vastly overstated by proponents of sex-based longevity tables. The work of Professors Bergmann and Gray shows that there is little relationship between sex and longevity with respect to the

overwhelming majority of men and women.[25] This is because a considerable overlap exists in the ages at which men and women actually die. In a group of 1,000 men age 65 and 1,000 women age 65, for instance, the studies of Professors Bergmann and Gray show that 84% of the men and women share the same age at the dates of their deaths. Only 16% of the group cannot match death ages. Thus, there are approximately 8% who are men who die relatively early unmatched by women's early deaths and 8% who are women who die relatively late whose deaths are unmatched by men. In short, the relationship between sex and longevity is significant only to a small proportion of these hypothetical males and females. Notwithstanding this fact, the actuarial tables attribute the characteristic of greater longevity to all women while attributing the characteristic of lesser longevity to all men. As we show later, it violates Title VII to require all women - and women alone - to assume the cost burden which the late deaths of a small percentage of women appear to require. For present purposes, however, we submit that the relationship between sex and longevity -- as it applies to each and every male and female -- is not so indisputable as to require a holding

---

[25] Supra, n. 17.

that longevity tables based on sex do not constitute sex discrimination.

Recent mortality data used by TIAA-CREF shows that female life expectancy at age 65 is increasing at a lesser rate than male life expectancy at age 65. The A-1949 table which was used in modified form by TIAA until March of this year shows that the male life expectancy at age 65 was 15.01 years and female life expectancy at age 65 was 17.94 years. The 71-IAM table which TIAA has used in modified form since March of this year shows that in more recent times male life expectancy at age 65 was 17.17 years and female life expectancy at age 65 was 20.10 years. Not only does this data show that the female rate of increase in expectancy is less than the male rate of increase, but also future data may be affected by the recent and continuing expanded employment opportunities for females under Title VII.

The point we emphasize about all of this data and about the selection of sex, among all factors associated with longevity, as a determinant of costs and benefits, is that "conscious choice is involved in both the collection and the use of statistical data for the preparation of annuity programs." Interim Report on Equal Periodic Pension Benefits for Men and Women, 62 AAUP Bull. 339 (Autumn 1976). It is our view that the insurance industry made a conscious choice in responding to the increased

demand for pension programs not to use data concerning factors other than sex which appreciably affect longevity. In constructing tables to determine the costs and benefits of these retirement programs, the industry has conclusively relied upon sex alone, of all longevity characteristics. In view of the sole reliance on sex in determining benefits and costs, the body of knowledge concerning other factors associated with longevity, the evidence that sex and longevity are linked, if at all, only in a small segment of the population, and this Court's indication in Gilbert and Satty that disparate treatment in coverage of the same risk is sex discrimination, we submit that the mortality tables at issue do discriminate because of sex.

B. Title VII proscribes the use of sex, among all factors associated with longevity, as a conclusive determinant of the benefits and costs of retirement plans.

Section 703(a) of Title VII provides:

> (a) It shall be unlawful employment practice for an employer -
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to

> discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." 42 U.S.C. §2000e-2(a)(1).

The statute, on its face, admits of no exception for retirement plans, and literally proscribes all discrimination in "compensation" under §703(a)(1).[26] Strict construction of this statute requires a ruling that where an employer decides to insure its employees against the risk of longevity, both the benefits and the costs of that insurance must be on a parity as between males and females. In both the plan at bar and the TIAA-CREF plan, the failure to provide each and every female employee with risk coverage equivalent to her male counterpart is a clear and unequivocal discrimination against individuals with respect to compensation, terms, conditions and privileges of employment in violation of §703(a)(1).

[26] This brief does not treat §703(a)(2) since a ruling under that section is not necessary to the decision of this case. That the retirement benefits amount to "compensation" has been amply demonstrated, infra, pp. 7-11, and there is no occasion to elaborate on that proposition. Supra, n. 9.

Going beyond the face of the statute, however, may be necessary in light of this Court's recent Title VII analysis of employee benefit plans. Gilbert and Satty suggest that retirement plans first be evaluated on their face to determine whether they contemplate gender-based discrimination. As demonstrated before, the selection of sex as the exclusive determinant of costs and benefits, in the circumstances here, amounts to discrimination because of sex and therefore renders retirement plans based upon such tables discriminatory on their face. The court below faithfully followed this mode of analysis in holding that "when sex is singled out as the only, or as a predominant, factor, the employee is being treated in the manner which Title VII forbids." 553 F.2d at 591. We believe that the Court should affirm that holding.

This Court has also held that a violation of §703(a) can be proved by evidence of discriminatory effect. Nashville Gas Company v. Satty, supra; Griggs v. Duke Power Company, 401 U.S. 431 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The discriminatory effects in this case are plain. Under these sex-based retirement plans, women either receive lower benefits for the same dollar contributions or they are required to contribute more to the plan as a means of achieving equivalent benefits. In no case under these plans is there any parity of benefits accruing to men and women alike as a result

of the employer's insurance against the risk of longevity. This discriminatory effect is highlighted by the fact that the overwhelming majority (84%) of male and female employees die at the same time; yet the use of sex as a conclusive determinant of costs and benefits either lowers every woman's benefits or raises every woman's cost of securing equal benefits. See Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971). In short, the attribute of long life expectancy which is shared by a small percentage of females becomes a fulcrum for burdening all females but no males. The impact on females is not just disproportionate - it is exclusive. Thus, the discriminatory effect of these plans is clear.

The ultimate impact which these sex-based retirement plans are beginning to make and will increasingly make upon our nation's retired citizens should not be overlooked. Those retirees who are female and whose retirement benefits are measured by discriminatory actuarial standards are and will be relegated to lower deferred compensation and an inferior style of life in their later years. To condone the use of sex-based longevity tables on the slender rationale offered by their proponents is to single out by sex a huge group of females and thereby commit them to second class retirement.

The discriminatory effect of these deferred compensation plans is apparent in other ways. First, where the utility

of male and female employees (those in the same jobs with the same length of service) is presumed to be equal, it is discriminatory to require females to suffer lower benefits or higher cost for equal benefits. The wage-productivity equation is effectively nullified by retirement plans in which sex is the exclusive determinant of benefits and costs. This has prompted one commentator to ask whether the guaranty of equal employment opportunities is "so fragile that a woman may now aspire to jobs which in the past were closed to her, but only if she will accept a lesser degree of remuneration?"[28]

Second, the discriminatory effect is most apparent in that vast majority of male and female counterparts who share the same actuarial death ages. For those persons - who comprise most of the workforce - only one's sexual identity alone determines the value of one's coverage against the risk of longevity. Thus, the great majority of men and women who share the same death age will also share this common disparity in the value of their insurance against longevity: each man will have paid less money in contributions or will have received more money in benefits than each woman.

---

[28] M. Gold, supra, 9 Loyola of L.A.L.Rev. at p. 618.

Finally, to the extent that an intent to discriminate is pertinent to the finding of an unlawful employment practice under §703(a),[29] intent may be inferred from the face of these plans which do not even pretend not to differentiate on the basis of sex. In any event, there is also clear and unmistakable circumstantial evidence that retirement plans which refer to actuarial tables determined solely by sex plainly are intended to discriminate against women within the meaning of prevailing authority. See generally, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); cf. Washington v. Davis, 426 U.S. 229 (1976). The requisite showing of intent can be made without proving that the challenged decision was motivated solely by a discriminatory purpose or that the purpose was even a dominant or primary one. The standard is that where a discriminatory purpose has been a "motivating factor" in the decisional process, a finding of invidious discriminatory purpose may be made. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at ___. In any event, "determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Id. 429 U.S. at ___.

---

[29] See Nashville Gas Company v. Satty, 46 U.S.L.W. at 2048.

In the case of sex-based retirement benefits and costs, a fair application of the factors enumerated in Arlington Heights requires the conclusion that the sex discrimination here is purposeful and intentional. As stated above, the discriminatory effect of using sex-based mortality tables is substantial and unambiguous. Likewise, the historical background reveals a purpose to isolate sex as the exclusive determinant of costs and benefits. From the considerable background material which we set forth on pages 5 through 17, one can fairly infer that the providers of insurance against the risk of longevity genuinely intended the inevitable consequences of excluding all considerations of longevity other than sex. Moreover, the same material shows that the insurance industry substantially departed from its ordinary standards of study and classification when it decided to exclude all determinants other than sex from the longevity tables. Finally, the frank admissions, in testimony and otherwise, of insurance industry officials supports the view that the offerors of longevity insurance understand fully that the decision to exclude all longevity factors other than sex is a cost saving device which sacrifices sound insurance principles and contravenes wise public policy.

Where the statutory language is unambiguous and the discrimination is so clear, both on its face and in effect, the Court should not hesitate finding that §703(a)(1) proscribes the conduct at issue here.

C. Title VII proscribes any requirement that all female employees - and females alone - pay the costs of providing to females the same protection which males receive against the risk of longevity.

The proponents of sex-based mortality tables point out that if they are forced to comply with Title VII and equalize male and female retirement benefits, there will be a cost to be absorbed. To the extent that such a cost materializes, the question is whether that cost is to be paid by all female employees because of their sex or whether the cost is to be spread equitably among all employees like all elements of overhead which an employer must incur by having female employees.[30]

---

[30] Employers do not in practice hire two separate sets of employees and allocate overhead between the sexes of their employees. It defies both notions of elemental fairness as well as the plain

Spreading the modest incremental cost of longevity shared by a small percentage of females over the widest group possible is certainly consistent with the mandate of Title VII and the cases construing it.[31] For example, the court below properly noted that Title VII requires treatment of each employee as an individual and not as a member of a particular sex, race or other protected group. 553 F.2d at 590-91. Accordingly, the court below did not find persuasive the argument advanced in this Court that the costs of insuring against female

---

30 Cont'd
requirements of Title VII to require only women, because of their sex, to shoulder the burden of female longevity especially when most women do not even exhibit that characteristic.

31 Manhart v. City of Los Angeles, 553 F.2d 581 (9th Cir. 1976); Henderson v. Oregon, 405 F.Supp. 1271 (D.Ore. 1975); cf. Reilly v. Robertson, ___ Ind. ___, 13 EPD ¶1126 (1977).

longevity should be borne by all females, but not by any male.[32]

The principle that Title VII prohibits employers' requiring females to bear a disproportionate share of the cost of insuring against longevity is not inconsistent with modern industrial practices. Indeed, we understand from the amici who support sex-based mortality tables that private industrial pension plans ordinarily pay employees a fixed percentage of their salaries, regardless of sex. When there are incremental costs in providing these benefits to the relatively small number of long lived females, the employers are shouldering the cost as an element of their overhead. In any event, they are certainly not assessing their female employees for the cost of insuring that small percentage which lives past a normal life expectancy. Yet, in the face of this practice, this Court is being told that equal benefits are virtually impossible. In truth, equal benefits can be provided to all employees, male and female alike. Title VII simply requires that the cost of providing these equal benefits be shared by all employees, male and female alike.

---

32 The construction of Title VII which prohibits an employer from requiring females to be responsible for various portions of overhead useful to a small percentage of females is also consistent with EEOC

In seeking a special exemption from the requirements of Title VII, the proponents of sex-based mortality tables raise several arguments against spreading the cost of insuring against the risk of longevity. These arguments, for the most part, constitute attempts to justify present practices on the grounds of "business necessity" within the meaning of Griggs v. Duke Power Company, supra. See also Nashville Gas Company v. Satty, 46 U.S.L.W. at 4028, n. 5 and text. The general rule is that if an employer's business necessitates the adoption of particular compensation or other employment policies which have the effect of discriminating, Title VII may not prohibit the adoption of these policies. Griggs requires that the touchstone of an exemption from Title VII be "business necessity", and the burden of producing clear and compelling proof of such necessity is on the party seeking to justify the discriminatory policy. And, it must be emphasized that the burden is not met by a simple showing that it costs money for an employer to provide the equal treatment to its employees. E.g., Robinson v. Lorillard Corp., 444 F.2d 791, 799 n. 8, 800 (4th Cir.), cert. denied, 404 U.S. 1006 (1971). Indeed, in Taylor v. Goodyear

32 Cont'd
regulations and rulings. See 29 C.F.R. §1604.9(f); EEOC Dec. No. 75-146 (Jan. 13, 1975).

Tire & Rubber Co., 6 FEP Cases 50 (M.D. Ala. 1972), an employer argued that the costs of sickness and accident benefits for male and female employees were not equal and that the difference in the amount of benefits was justified by the difference in the costs of providing these benefits. The district court reasoned:

> "It was established that the cost of providing sickness and accident benefits for the female employees at this plant was higher than the cost of providing such benefits for the male employees. It was also established that the percentage of the difference in the cost of sickness and accident benefits for the female and male employees exceeded the percentage of the difference in benefits in every year between 1965 and 1970.
>
> However, the Court is of the opinion that these facts do not constitute a legal justification for the differential in benefits. In the first place, the higher cost of providing these benefits for female

employees cannot be regarded as proof that the cost of providing these benefits for each of the female employees was higher than the cost of providing them for each of the male employees. In the second place, the EEOC guidelines provide in unequivocal terms that 'it shall not be a defense under Title VII to a charge of sex discrimination in benefits that the costs of such benefits is greater with respect to one sex than the other'. The differential in the amount of benefits was unlawful under Title VII and the plaintiffs are entitled to relief." 6 FEP Cases at 57-58.

The proponents of the sex-based mortality tables make some attempt beyond costs to justify current practices by arguing as follows: (i) that tables not based on sex are not feasible; (ii) that there will be a material adverse effect upon the stability of present retirement programs and (iii) that competing social policies require an exemption for retirement plans from Title VII. These arguments are insubstantial for the following reasons.

First, retirement plans can be based upon tables not using sex as the prime determinant and, in fact, many such plans are now in effect. For instance, Jonathan Schwartz, the chief actuary of the five actuarially funded retirement systems of the City of New York, testified in a deposition last year that "it is not uncommon to have plans in private industry where the rate of contribution is a fixed percent of salary regardless of sex" and where all employees receive the same retirement benefit regardless of sex.[33] Costs and benefits of many federal and state retirement plans are also computed without regard to sex and, despite other funding problems, there is no evidence to show that the absence of sex as a prime determinant of costs and benefits has materially adversely affected these

[33] Women in City Government United v. The City of New York, No. 75 Civ. 2868 (S.D.N.Y.) (Deposition of Jonathan Schwartz, p. 68).

plans.[35] Since it is clear that a mortality table excluding sex (or even one including sex as one among a considerable number of other determinants of longevity) can be constructed, it is certainly no objection to changing the status quo that difficult problems may be encountered. The only problem pointed out to this Court so far as we have seen is the modest increase in the cost of providing equal insurance benefits against the risk of longevity.[36] If this incidental

---

[35] TIAA-CREF has stipulated in Spirt v. TIAA, No. 74 Civ. 1674 (S.D.N.Y.) that "it would be technically possible to construct a mortality table which would combine mortality statistics relating to both males and females . . . [and] such a table, however, would necessarily reflect the male-female composition, or ratio, of the group of persons to which it related." Stipulation of Facts ¶32. In fairness, TIAA further stipulated that the parties differed as to the necessity, fairness, validity and propriety of such a mortality table under applicable law. Id.

[36] Considerations of administrative case, which are not entitled to much weight, have been hinted at, but do not rise to the level of oppression necessary to sustain a business necessity "defense". Brief of American Council of Life Insurance at p. 18, n. 36.

cost does materialize,[37] and if the employer decides to equalize benefits by increasing female benefits, rather than by reducing male benefits, Title VII clearly requires that all employees bear a proportionate share of paying these increased costs, if the employer is not otherwise required to do so. In no event, however, does Title VII permit the employer to impose the incremental cost upon every individual female and exempt every individual male from sharing it. Indeed, it would likely be counterproductive for employers to do so since employers maximize profits by attracting and keeping productive employees, making retirement prospects bright, maintaining good employee morale and achieving a non-discriminatory workforce. Business necessity, therefore, tilts in favor of doing everything possible to equalize coverage of the risk of longevity for males and females.

---

[37] An increase in cost is not certain since more refined tables may be used to select out some risks and thereby lower some costs. Moreover, the increase will not likely be any faster than the progress women make into the workforce by virtue of Title VII's mandate.

Second, the proponents of sex-based mortality tables say that retirement systems will become unstable unless sex continues as the prime determinant of costs and benefits. They point again to the increased cost of providing equal benefits to females, but we have shown that this cost, if not assumed by the employer, can be paid for equitably by all of the beneficiaries, male and female alike. Moreover, the cost of funding can possibly be reduced by more careful study and pooling of annuitants. Providers of annuities can determine in advance mainly by written applications those persons who possess a high risk of longevity and those who do not. By means of this kind of refinement, which is common to all forms of insurance, the cost of providing benefits may be adjusted in accordance with the risks revealed. Additionally, there is no material evidence to suggest that retirement plans not using discriminatory tables are, in fact, bankrupting themselves <u>because of the absence of sex as the determinant</u> of their costs.

Promoters of sex-determined retirement benefits also assert that mostly male employers would, by market pressure, leave existing plans and go to companies which insure only groups which are almost exclusively male. With respect to teaching institutions this is highly unlikely since TIAA-CREF occupies such an important position in the retirement plan business that the prospect of short term low rates

would not likely cause a significant market shift. Moreover, offerors of insurance plans could not properly cater solely to single-sex groups. Also, the ultimate impact of Title VII in the labor force will eventually result in a more fully sexually integrated pool of prospective annuitants. This, too, will reduce market pressure to shift carriers.

Finally, the proponents of sex-determined costs and benefits fall back upon what they consider to be wise public policy in arguing for an exemption from Title VII: "Although social arguments have their place . . . they do not work well in the private sector."[38] The argument continues that if this matter is to be decided as a contest of competing value judgments, the Court should consider that "mandation of how to classify or rate policies . . . could cause elimination of the private insurance market with the necessity of a take-over by the government -- a trend which is just the opposite of what the public and the President, appear to want." B. Lautzenheiser, "Sex And The Single Table Revisited," <u>Actuary</u> No. 7 at p. 1

---

[38] B. Lautzenheiser, <u>Sex and The Single Table: Equal Monthly Retirement Income For The Sexes?</u> Employment Benefits Journal (Fall 1976).

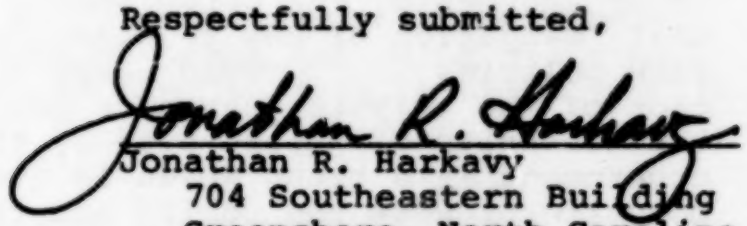
(September, 1977). This kind of scare tactic is hardly worthy of mention, except to say that if the matter is considered to be one of competing value judgments, we believe that Congress has made that judgment by requiring an end to employment discrimination of all kinds and a change in the patterns of business practices to accomodate the worthy public policy underlying Title VII.

CONCLUSION

For all of the foregoing reasons, ANA respectfully submits that the decision of the Court below should be affirmed.

This 20th day of December, 1977.

Respectfully submitted,



Jonathan R. Harkavy
704 Southeastern Building
Greensboro, North Carolina
27401

Of Counsel:

Edward Kriss
American Nurse's Ass'n
2420 Pershing Road
Kansas City, Missouri 64108

Nahomi Harkavy
Smith, Patterson, Follin,
Curtis, James & Harkavy
704 Southeastern Building
Greensboro, North Carolina, 27401

FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, et al.,
Petitioners,

vs.

MARIE MANHART, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)
and
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICI CURIAE

J. ALBERT WOLL
ROBERT C. MAYER
MARSHA S. BERZON
736 Bowen Building
815 - 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 - 16th Street, N.W.
Washington, D.C. 20006
Attorneys for AFL-CIO

JOHN A. FILLION
ANNE M. TREBILCOCK
8000 East Jefferson Avenue
Detroit, Michigan 48214

STEPHEN P. BERZON
FRED H. ALTSHULER
177 Post Street
San Francisco, California 94108
Attorneys for UAW

PERNAU-WALSH PRINTING CO. - 862 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

Page

Interests of amici curiae 2

Summary of argument 4

Argument 9

I

The policy requiring all women to contribute more toward pension benefits than all men is a per se violation of Title VII unless there is a statutory affirmative defense 9

II

Congress intended ordinary Title VII principles to apply to employee benefit programs 18

A.

The department's pension plan does not treat similarly situated women and men equally 19

B.

The group nature of insurance requires no special Title VII standard 24

1. Rationality 27

2. Economics 32

3. Subsidization 36

4. Indices of legislative intent 39

III

The Bennett Amendment to Title VII does not permit express gender-based differences in employee benefit plans 45

A.

The equal pay act does not cover employee benefit plans 46

B. Page

If employee benefit plans are covered by the Equal Pay Act, that Act does not "authorize" express gender-based differences in such plans 53

1. Exception (iv) to the Equal Pay Act 53

2. Legislative intent as to pension plans 57

Conclusion 62

Table of Authorities Cited

Cases **Pages**

Bartmess v. Drewrys, 444 F.2d 1186 (7th Cir. 1971) 52
Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) 22
Brennan v. Modern Chevrolet Co., 363 F.Supp. 327 (N.D. Tex. 1973) 49
Brennan v. Veterans Cleaning Service, 482 F.2d 1362 (5th Cir. 1973) 49
Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945) ... 48
Burns v. Rohr Corp., 346 F.Supp. 994 (S.D.Cal. 1977) ... 22

Califano v. Goldfarb, 430 U.S. 199 (1977) 28, 31, 61
Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 55, 57
Craig v. Boren, 429 U.S. 190 (1977) 6, 15, 30, 31, 32

Dothard v. Rawlinson, ... U.S. ....., 45 U.S.L.W. 4888 (1977) 4, 11, 13

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 17
Frontiero v. Richardson, 411 U.S. 677 (1973) 30, 31

Geduldig v. Aiello, 417 U.S. 484 12
General Electric Co. v. Gilbert, 429 U.S. 127 (1976) .....
.....4, 6, 11, 12, 16, 23, 24, 52

Henderson v. Oregon, 405 F.Supp. 1271 (D.Ore. 1975) 13, 14
Hodgson v. Brookhaven General Hospital, 436 F.2d 719 (1970) 52
Hughes v. Alexander Scrap Corp., 426 U.S. 794 (1976) ... 18

Inland Steel Co. v. National Labor Relations Board, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949) 52

Katzenbach v. Morgan, 384 U.S. 641 (1966) 16, 17, 18

Manning v. International Union, 466 F.2d 816 (6th Cir. 1972), cert. denied, 410 U.S. 442 (1973) 22

Nashville Gas Co. v. Satty, ... U.S. ..... (December 6, 1977) 12, 24

Oregon v. Mitchell, 400 U.S. 112 (1970) 17, 18

Peters v. Missouri-Pacific Railroad Co., 483 F.2d 490 (5th Cir.), cert. denied, 414 U.S. 1002 (1973) 52

Pages

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) ... 10

Reilly v. Robertson, 360 N.E.2d 171 (Ind.Sup.Ct. 1977) ...13, 35
Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3rd Cir. 1973) 52

Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970) 49
Stanton v. Stanton, 421 U.S. 7 (1975) 21, 22, 31, 32

Teamsters v. United States, 431 U.S. 324 (1977) 10, 11, 32

United Airlines, Inc. v. McMann, ... U.S. ....., 46 U.S.L.W. 4043 (1977) 40, 41

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 30, 31

Constitutions

United States Constitution:
Fourteenth Amendment 15, 16, 18
Fourteenth Amendment, Sec. 1 17
Fourteenth Amendment, Sec. 5 .....16, 17
Fifteenth Amendment 17

Rules

Supreme Court Rules, Rule 42 2

Regulations

29 C.F.R.:
Section 531.35 49
Section 531.40 49
Section 1604.9 .....52, 53
Section 800.110 .....51, 52
Section 800.113 .....51, 52, 53
Section 800.116(d) 51, 52, 53
Section 800.142 .....53, 56
Sections 800.145-800.150 56
Section 800.151 .....53, 60

Statutes

Pages

Civil Rights Act of 1964, Title VII .....passim
Section 703 10
Section 703(a) 15, 40
Section 703(a)(1) 41, 52
Section 703(a)(2) 41
Section 703(e) 11, 15
Section 703(h) 15, 62

29 U.S.C.:
Section 203(m) 49
Section 206 .....48, 52
Section 206(d) 15, 45, 54, 61
Sections 620 et seq. 40
Section 623(a)(1) 40
Section 623(a)(2) 40
Section 623(f)(2) 40

42 U.S.C.:
Section 2000e-2(a)(1) 40
Section 2000e-2(a)(2) 40
Section 2000e-2(e) 11, 15
Section 2000e-2(h) 45

Equal Pay Act, 77 Stat. 56, "Declaration of Purpose," Section 2(a)(1) 49

Fair Labor Standards Act of 1938, 52 Stat. 1960, "Declaration of Policy," Section 2(a) 49

Other Authorities

Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv.L.Rev., 91, 107 (1966) .. 17

Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev., 1109, 1174 (1971) 31

Fellers, "Pension Costs and Cost Experience," in Bureau of National Affairs, Pensions and Profit Sharing, 151 (3rd ed. 1964) 28

Metropolitan Life Insurance Co., Statistical Bulletin, 10-11 (May, 1977) 27, 37

Rethorford, The Changing Sex Differential in Mortality, 104 (1975) 27

Pages

U.S. Dept. of H.E.W., National Center for Health Statistics, Vital Statistics of the United States (December 14, 1977) 27

U.S. Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, 3174 (1968) 40

Congressional Documents

109 Cong. Rec. 8916 (1963) 50

109 Cong. Rec. 9206-9208 60

110 Cong. Rec. 13663-64 (1964) 61

113 Cong. Rec. 31255 (1967) 41

H. Rep. No. 309 60

H. Rep. No. 309, 88th Cong., 1st Sess., 2 (1963) 47

H. Rep. No. 309, 3 56

H. Rep. No. 309, 8 47

Hearings of S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 53 (1967) 40

H. Rep. No. 91-1434, 91st Cong., 2nd Sess. (1970) 44

H.R. Rep. No. 92-238, 92nd Cong., 1st Sess., 2 (1971) 41

H.R. Rep. 92-238, 92nd Cong., 1st Sess., 5 (1971) 16, 18

H.R. 17555 41

Esch Amendment to H.R. 17555, 91st Cong., 2d Sess. ..41, 42, 44

Letter and Analysis by Martha W. Griffiths concerning the Esch Amendment to H.R. 17555, 91st Cong., 2d Sess., in Congressional Information Service, Discrimination Against Women, 380-382 (Bowker, Ed., 1973) 44

Senate Bill, 109 Cong. Rec. 8914 47

S. 2453 41

S. Rep. No. 176, 88th Cong., 1st Sess., 3 (1963) 47

S. Rep. No. 176, 88th Cong., 1st Sess., 4 (1963) 50, 59

S. Rep. No. 92-415, 92nd Cong., 1st Sess., 7-8 (1971) 16, 18

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, et al.,
Petitioners,

vs.

MARIE MANHART, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICI CURIAE

This brief *amici curiae* is filed in support of the position of the respondents by the International

Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTERESTS OF AMICI CURIAE

The UAW is this country's largest industrial labor union with approximately 1,300,000 members in the United States, over 210,000 of whom are working women. Among the UAW's principal objectives is the protection of the welfare and security of its members after retirement. The UAW has historically placed heavy emphasis on the establishment of pension plans in negotiating collective bargaining agreements. Its staff includes four professional actuaries who help formulate UAW plans and monitor similar plans in other industries. The UAW has negotiated approximately 1,500 pension plans covering almost all of its American workers.

The AFL-CIO is a federation of 109 national and international unions, having a total membership of approximately 14,000,000 workers, a substantial portion of whom are women. As such, it is the principal spokesman for the American trade union movement. Virtually all AFL-CIO affiliates negotiate pension plans for their members in the course of collective bargaining, and many affiliates play a role in the administration of such plans.

Contrary to the implication in several of the briefs *amici curiae* filed in support of petitioners, most single-employer defined-benefit pension plans in American industry today are "sex-neutral" plans that do not charge women a greater contribution and do not pay women lower benefits at retirement. Almost all the UAW's 1,500 existing plans are "sex-neutral" in this respect, as are the great majority of defined-benefit plans negotiated by AFL-CIO affiliates.

As the experience of the UAW and AFL-CIO affiliates proves, pension plans need not be sex-discriminatory to be actuarially sound. Indeed, sex-discriminatory pension plans are the exception rather than the rule, historically being confined to educational and governmental institutions, and they have been decreasing in usage in recent years.

In this brief, we seek to dispel the impression that sex-discriminatory pension plans are a practical necessity, and that the overt sex discrimination apparent from the face of these plans is compatible with the provisions of Title VII of the 1964 Civil Rights Act. As a corollary, we will show that the "sex-neutral" plans negotiated by the trade union movement throughout American industry are not unfair to men.

Petitioners have also raised fundamental questions about the test to be applied in determining whether a given employment practice that discriminates against women violates Title VII. As representatives of millions of working women, and as leaders in the effort to eliminate sex discrimination in employment, the UAW and AFL-CIO have a vital interest in

assuring that the standards for determining sex discrimination under Title VII are not weakened.

SUMMARY OF ARGUMENT

I. Conceptually, this is a very simple case. Since all women employed by the City of Los Angeles Department of Water and Power take home less pay than men in the same job but receive no more in periodic pension benefits when they retire, there is plainly disparate treatment based directly upon gender. Such treatment is at the core of the evils Title VII was intended to prevent, and this Court has never doubted that any employment practice that explicitly and overtly treats women differently from men violates Title VII unless there is an affirmative defense applicable. Only where an employment practice is based upon facially neutral principles is it necessary to inquire into its effect upon women as a group in order to determine whether there is a Title VII violation. *Dothard v. Rawlinson,* ..... U.S. ....., 45 U.S.L.W. 4888 (1977); *General Electric Co. v. Gilbert,* 429 U.S. 127 (1976).

The discriminatory policy cannot be justified by the fact that it is based upon a statistically significant correlation between a prohibited classification—gender—and a neutral factor—longevity. Title VII does not permit individuals in protected classifications to be treated according to group characteristics. Here, in fact, since over eighty percent of men and women die at the same age, such treatment harms 80% of the

women because 20% of the women live longer lives, and benefits 80% of the men because 20% of the men live shorter lives. A plainer example of the sort of harm which Title VII was intended to prevent is hard to imagine.

It is not necessary to declare the Department's discriminatory policy "irrational" in order to find a Title VII violation. The same standard of scrutiny applies under Title VII to race and to sex discriminatory policies, except that there are two affirmative defenses to sex discrimination not available with respect to race discrimination. Therefore, the Department's policy violates Title VII unless the only pertinent defense, the Bennett Amendment, provides an exemption.

II. Before discussing the Bennett Amendment issue, however, we discuss the arguments that the ordinary Title VII principles are inherently anomalous in the insurance context, and that Congress must therefore have intended an exception.

A. Petitioners urge that despite a clear difference in treatment between men and women, there is not any inequality here, because women will receive retirement benefits for a longer time and therefore can be fairly asked to contribute more toward those benefits. But, even though women as a group live to a higher average age, no individual woman has any assurance whatever that she will collect more in benefits than any individual man, or even than the average man. Thus, what the Department's policy does is to distribute among women only, and not among employees

generally, the cost of paying retirement benefits to those comparatively few women who live longer than the average male. The fact that a discriminatory policy does not harm, or even favors certain members of a protected class does not save it where there is *per se* discrimination. *Gilbert, supra,* is not to the contrary; in *Gilbert,* only those women who incurred the excluded additional risk, and not all women, were affected by the policy excluding pregnancy from disability coverage.

B. While insurance is based on the pooling of risks among large groups of people, there is nothing inherent in insurance which mandates subdivision of an insured group along gender lines. To prohibit such subdivision for employee benefit programs is not irtional, economically naive, or fundamentally unfair to men.

First, there are many other subgroupings which would be available if it were desired to classify employees by risk of longevity. The fact that these are not used indicates that longevity subgroupings are *not* necessary.

Further, this Court's sex discrimination cases "have . . . rejected the use of sex as a decision-making factor even though the [policies] in question . . . rested on . . . predictive empirical relationships." *Craig v. Boren,* 429 U.S. 190, 202 (1977). Nor is insurance special in that it is not possible to determine which members of a group actually have the relevant characteristic. This was true in *Craig,* and in other sex discrimination cases as well.

Second, there is no economically compelling reason for the sex classification. While it may be necessary, where purchase of insurance is voluntary, to price either contributions or benefits by degree of risk in order to avoid adverse selection, the adverse selection theory has no application where, as here, individuals have no choice whether to be covered by the pension plan or not.

Third, while, in a sex-neutral benefit plan, men as a group can be said to "subsidize" women as a group, there is nothing unfair about this. Mandatory group benefit programs rely, in fact, upon cross-subsidization of high risk persons by low risk persons for their strength—providing adequate and basically equal coverage to people in many different life situations. Thus, the assertion that a sex-neutral plan unfairly discriminates against men really amounts to the contention that low risk men are somehow entitled to be sure that "their" money is used only for high risk men and not for high risk women. This contention is an example of exactly the sort of rigid gender-based approach to employment relationships which Title VII prohibits.

Finally, not only is there no reason inherent in insurance principles for supposing that Congress created an implied exception for gender-based differences in treatment under employee benefit plans, but there are express indications that no exception was intended. The first is that the Age Discrimination in Employment Act, otherwise quite similar to Title VII, contains an express exemption for pension and retirement

plans. The legislative history shows that the reason for this exemption was the understanding that otherwise, the equality principle would require that the same benefits be provided under employee benefit programs to workers older when hired. Second, in 1970, an attempt was made to amend Title VII itself to exclude employee benefit programs, but this attempt failed.

III. The only statutory defense possibly applicable here is the Bennett Amendment, which provides that any wage differential based on sex "authorized" by the Equal Pay Act does not violate Title VII. To be within the Bennett Amendment exemption, an employment practice must first be determined to be a wage differential, for the Equal Pay Act is concerned only with wages. Because the Equal Pay Act is part of the minimum wage section of the Fair Labor Standards Act, the concepts used in the minimum wage context apply. And, pension programs are not "wages" for purposes of the minimum wage provisions. Thus, the discrimination here is not within the purview of the Equal Pay Act at all and could not possibly be "authorized" by that Act.

Moreover, even if this were considered a case of discrimination in wage rates, the Equal Pay Act would not permit the differential. For, that Act prohibits such a differential unless justified by a seniority, merit, or productivity system, or by "any other factor other than sex." The language, structure, and legislative history of the Act all lead to the conclusion that "any factor other than sex" must be a facially neutral

factor and not one itself based upon gender. While petitioners contend that the legislative history demonstrates a specific intention, nonetheless, to permit gender-based distinctions in employee benefit plans, the material contemporaneous with the passage of the Equal Pay Act contains no such permission.

Since this is a clear case of gender-based discrimination, and since there is no applicable statutory defense, the judgment below should be affirmed.

ARGUMENT

I

THE POLICY REQUIRING ALL WOMEN TO CONTRIBUTE MORE TOWARD PENSION BENEFITS THAN ALL MEN IS A PER SE VIOLATION OF TITLE VII UNLESS THERE IS A STATUTORY AFFIRMATIVE DEFENSE

The length and complexity of the briefs of petitioners, and of amici supporting their position, belie the fact that conceptually, this is a rather simple case. All women who work for the City of Los Angeles Department of Water and Power (hereafter "the Department") take home in each pay check less than men holding the same job. The difference in take-home pay between men and women is explained as a higher periodic contribution by women toward the pensions they will receive when they retire. But, upon retirement, women receive no more than men in periodic benefits. The result is that all women have less money to live on each month while they are working, and no more to live on each month when they retire.

A clearer case of gender-based discrimination prohibited by Section 703 of Title VII is hard to conceive. All women are treated differently than all men. And,

> "disparate treatment [based on race, color, religion, sex, or national origin] was the most obvious evil Congress had in mind when it enacted Title VII. See, e.g., 110 Cong. Rec. 13088 (1964) (remarks of Senator Humphrey) ('[the bill] . . . provides that men and women shall be employed on the basis of their qualifications, not as . . . [women] citizens, but as citizens of the United States.')"
>
> *Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977).

This Court has never doubted that any employment practice that explicitly and overtly treats women differently than men violates Section 703 of Title VII, unless an affirmative defense is available. For example, in *Phillips v. Martin Marietta Corp.,* 400 U.S. 542 (1971), the Court was faced with a policy forbidding the hiring of women, but not men, with preschool age children. The court of appeals had ruled that there was no sex discrimination because most of the employees who were hired were women, and women as a group were therefore not harmed. In its first decision construing Title VII's prohibition of sex discrimination, the Court reversed in a brief *per curiam* opinion. Regardless of the effect upon women as a group, the Court declared, employers may not ordinarily "have one policy for men and one for women each having pre-school age children." *Id.,* at 544.

While it may be, said the Court, that "the existence of . . . conflicting family obligations is demonstrably more relevant to job performance for a woman than for a man," this justification was not relevant to whether there was discrimination, although it "could arguably" constitute an affirmative defense under Section 703(e) of the Act. *Id.*[1]

In *Dothard v. Rawlinson,* ..... U.S. ....., 45 U.S.L.W. 4888 (1977), the Court dealt with two different policies alleged to discriminate on the basis of sex: a height and weight limitation asserted to disqualify many women, without justification, and an exclusion of all women from certain positions. In considering the first policy, the Court, applying the standards for disparate impact cases (*see Teamsters, supra,* 431 U.S., at 335 n.15), analyzed first the effect of the height and weight limits on women and then whether the facially neutral policy, despite its disparate impact, was justified because necessary to the employment in question. But in considering the second policy which, like the policy in the present case, drew an explicit gender-based line, the Court did not inquire into either impact or necessity; instead, it asked only whether an explicit statutory defense was applicable, and concluded that it was.

Similarly, in *General Electric Co. v. Gilbert,* 429 U.S. 127 (1976), the Court, faced with an employment

---

[1]Section 703(e), 42 U.S.C. § 2000e-2(e), permits gender-based discrimination where gender is a "bona fide occupation qualification ["bfoq"] reasonably necessary to the normal operation of that particular business or enterprise."

policy denying disability benefits for pregnancy but otherwise treating men and women alike, first inquired into whether that policy was "sex-based discrimination as such." 429 U.S., at 135. It concluded that it was not, because "[t]he program divides potential recipients into two groups—pregnant women and non-pregnant persons." *Id.,* quoting *Geduldig v. Aiello,* 417 U.S. 484, 496-97 n.10. Only *after* determining that discrimination based on pregnancy is not overt sex discrimination did the Court proceed to discuss the *effect* of the policy upon women, concluding that exclusion of pregnancy did not "discriminate against any definable group or class in terms of . . . aggregate risk protection." *Id.,* at 138; *see also Nashville Gas Co. v. Satty,* ..... U.S. ..... (December 6, 1977).[2]

Petitioners, however, maintain that the present case differs from other *per se* sex discrimination cases because the differential treatment is based on an objectively verifiable fact: that the *average* age at death is higher for women as a group than for men as a group. This, they contend, demonstrates that the difference in treatment is based on longevity rather than gender. Alternatively, they claim that the statistical correlation between gender and longevity shows that their differential treatment of men and women along explicit gender lines is rational, and that this showing is all that Title VII requires.

---

[2]*Satty* stressed twice that the analysis in *Gilbert* regarding "aggregate risk protection" applied only "when confronted by a facially neutral plan." *Satty,* slip op., at 8.

The notion that when a statistical correlation exists between some legitimate factor and a statutorily prohibited category such as gender, race, national origin, or religion, different treatment of *all* members of the group is not discrimination under Title VII is quite astonishing. For the most fundamental principle of Title VII is that persons should be treated as individuals rather than as members of groups drawn along prohibited lines. For example, "[i]t is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes." *Dothard, supra,* ..... U.S., at .....; 45 U.S.L.W., at 4891. And this prohibition applies whether the "stereotype" is a subjective perception or a verifiable fact about the group in the aggregate; either way, the individual is being treated in a certain way because of membership in a certain group, although he or she may not share the characteristics that other members of the group are thought to, or do, exhibit.

In the present case, the harmful effect of being treated on the basis of group averages is felt not by a handful of women, but by most of them. Analysis reveals that the difference in *average* longevity between men and women results from the fact that about 16% of men die quite young, while about 16% of women live to be quite old; the remaining men and women—more than 80% of each group—share common death ages. *Reilly v. Robertson,* 360 N.E.2d 171, 176 (Ind.Sup.Ct. 1977); *Henderson v. Oregon,* 405

F.Supp. 1271, 1275 n.5 (D.Ore. 1975).[3] This fact means that more than 80% of the women are penalized because less than 20% of women live longer lives, and conversely, more than 80% of the men benefit because less than 20% of men live shorter lives. A

[3]Petitioners, and amici appearing in their support, accept these figures as accurate but question their significance. They point out that if men and women of the same age at retirement are matched not by year of death but by order of death, it will turn out that the male in each pair will be much younger than the female in each pair. But, this is just another way of saying that the difference in the average in this instance is accounted for by large differences at the extremes rather than persistent differences affecting all or most men and women.

For example, the following chart shows two groups of ten numbers, which have a difference in averages of 1.6:

10	
10	
9	9
9	9
7	7
6	6
6	6
5	5
5	5
4	4
4	4
	2
	2
Average 7.5	5.9

Eighty percent of the numbers in each group are the same; the difference in averages results because two numbers in the first group are quite high and two numbers in the second group are quite low. If one matched these numbers in order, however, the one on the left would always be higher than the corresponding number on the right.

In the present context, the relevant consideration is age at death, not order of death. Retirement benefits are paid for the number of years one lives after retirement, so that a person's age at death is a measure of the total amount of money the fund will pay to that person. The order in which people die does not affect the amount of money *each* beneficiary receives, in total, from the fund.

plainer example of the sort of harm which Title VII was intended to prevent is hard to imagine.

The second contention—that the Department's overt discrimination does not violate Title VII because it has a rational basis—is based on the suggestion that Congress intended, or, because of constitutional considerations, must be assumed to have intended, a lesser standard of scrutiny under Title VII for sex than for race.[4]

This Court has never recognized any such distinction under Title VII. Title VII does differentiate between race and sex classifications in that it provides two special statutory defenses to sex discrimination: Section 703(e), the "bfoq" distinction; and the last sentence of Section 703(h), the "Bennett Amendment," which permits sex discrimination otherwise violative of Title VII if "authorized" by the Equal Pay Act, 29 U.S.C. § 206(d). But the affirmative prohibitions in Title VII, contained in Section 703(a), treat race and sex in a precisely parallel manner, and therefore the two express defenses must be taken as the only differences between race and sex discrimination for Title VII purposes.

The fact that race and sex classifications are handled differently under the Equal Protection Clause of the Fourteenth Amendment[5] leads to "no necessary

[4]Petitioners do not suggest that a rational purpose suffices to justify race classifications under Title VII.

[5]Even if relevant, this consideration would not lead to the conclusion that a rational basis is sufficient. Under the Fourteenth Amendment, justification of sex discrimination requires more than simple rationality. *Craig v. Boren*, 429 U.S. 190 (1976). Application of the *Craig* test would in our view result in invalidating the Department's plan. *Cf.* pp. 29-32, *infra*.

inference that Congress . . . intended to incorporate into Title VII the concepts of discrimination which have evolved [under] the Equal Protection Clause." *Gilbert, supra,* 429 U.S., at 133.[6] Not only is the structural parallel between race and sex discrimination in Title VII clear, but in 1972, when Congress enacted the coverage of public employees which created the cause of action here, it expressly disavowed any intention to subject sex discrimination to a lesser standard of scrutiny:

> "[W]omen's rights are not judicial divertissements. Discrimination against women is not less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."
>
> H.R. Rep. 92-238, 92nd Cong., 1st Sess., at 5 (1971); *see also id.,* at 4-5; S.Rep. No. 92-415, 92nd Cong., 1st Sess. at 7-8 (1971).

Finally, the suggestion that Congress was constrained, with respect to public employees,[7] to incorporate into Title VII the Fourteenth Amendment difference in the scrutiny accorded race and sex discrimination entirely misconceives the power of Congress under Section 5 of the Fourteenth Amendment. *Katzenbach v.*

[6]While *Gilbert, supra,* did indicate that Fourteenth Amendment analysis can be relevant in determining whether there is discrimination at all under Title VII (429 U.S. at 133-35), here the issue is not whether there is discrimination based on gender, but the standard of scrutiny once such discrimination is established.

[7]Although petitioners do not acknowledge as much, this argument, if accepted, would lead to different standards for gender-based discrimination under Title VII for public and private employees. For, as to private employees, Congress could clearly legislate whatever standard it chose under the Commerce Clause.

Morgan, 384 U.S. 641 (1966); *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976).[8]

In sum, overt gender-based discrimination does violate Title VII unless one of the two statutory defenses apply. No one has suggested that the "bfoq" defense is pertinent. We would therefore ordinarily proceed to a discussion of the only defense possibly

[8]Title VII's coverage of public employees was an exercise of Congressional power under Section 5 of the Fourteenth Amendment to pass statutes promoting the purposes of that amendment. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976). Legislation passed pursuant to Section 5 is valid if that legislation "may be viewed" as a means of securing equal treatment and the courts can *"perceive* a basis upon which *Congress* might predicate [*its*] *judgment."* *Katzenbach v. Morgan,* 384 U.S. 641, 652, 656 (1966) (emphasis added).

Morgan established 1) that § 5 of the Fourteenth Amendment authorizes Congress "to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," (*Id.,* at 651); 2) that in exercising this discretion under § 5, Congress is not limited to the regulation of conduct which a court might find to be violative of § 1 of the Fourteenth Amendment (*Id.,* at 652-53) and 3) that the courts should defer to congressional judgment of "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," as long as the legislation "may be viewed" as a means of securing equal treatment and the courts can "perceive a basis upon which Congress might predicate [its] judgment." *Id.* at 652, 656. Under *Morgan,* Congress, in regulating state activities,

> "has the power to enact any law which may be viewed as a measure for correction of *any* condition which Congress might believe involves a denial of equality or other fourteenth amendment rights."
>
> Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV.L.REV. 91, 107 (1966) (emphasis added).

While there were two dissenting Justices (Harlan, J. and Stewart, J.) in *Morgan,* both, in the subsequent case of *Oregon v. Mitchell,* 400 U.S. 112 (1970), accepted the crucial holding of *Morgan,* i.e., that Congress under § 5 can regulate conduct which arguably does not violate § 1 of the Fourteenth Amendment. For example, in discussing the Fifteenth Amendment, Justice Harlan indicated the *"danger of violation* of § 1 . . . was sufficient to authorize the exercise of congressional power under § 2." 400 U.S.

applicable, the Bennett Amendment. However, petitioners and, especially, the amici supporting their position, seem to be suggesting that, because this case involves insurance, established Title VII principles cannot apply. We therefore devote Part II of this brief to demonstrating that there is nothing in insurance or actuarial principles that renders the ordinary Title VII analysis inapplicable, and defer discussion of the Bennett Amendment to Part III.

II

CONGRESS INTENDED ORDINARY TITLE VII PRINCIPLES TO APPLY TO EMPLOYEE BENEFIT PROGRAMS

While petitioners, as noted, argue for a sweeping alteration of the established Title VII analysis of sex discrimination, the several amici appearing on their behalf do not dispute the established principles we have discussed above. Rather, they appear to argue that those principles are inherently inapplicable to

---

at 216. Justice Stewart recognized that *Morgan* upheld the power of Congress to

> ". . . override state laws on the ground that they were in fact used as instruments of invidious discrimination *even though a court in an individual lawsuit might not have reached that factual conclusion.*"
>
> *Id.*, at 296 (emphasis added).

Most recently *Morgan* was cited by Justice Powell in *Hughes v. Alexander Scrap Corp.*, 426 U.S. 794, 813 (1976), as authority for deferring to legislative judgments.

In enacting the public employee coverage of Title VII in 1972, Congress explained precisely why it believed that gender-based discrimination in employment requires basically the same level of scrutiny as race discrimination. H.R.Rep. No. 92-238, *supra*, at 4-5; S. Rep. No. 92-415, *supra*, at 7-8. This decision, which surely furthers the right to equal treatment accorded by the Fourteenth Amendment, was a reasonable exercise of discretion and is therefore entitled to deference.

cases involving insurance, and that Congress therefore must have intended a special approach in such cases.

This contention takes two related forms: *first,* the assertion that despite diverse treatment based squarely and overtly on gender lines, women and men are in fact being treated "equally" by the Department; and *second,* the argument that even if inequality exists, ordinary principles cannot apply to invalidate that inequality because there is no rational alternative to sex classifications in the insurance context.

A.

The department's pension plan does not treat similarly situated women and men equally

Petitioners' argument that there is no inequality in this case cognizable under Title VII is perhaps most simply stated in their "loaf of bread" analogy:

> "The [system] may be analogized to [a loaf] of bread accrued at the date of retirement . . . [U]nder the Department's Plan, women are to receive the same size 'slice' of bread each month after retirement but because they live longer they must have a longer loaf in order to pay all the 'slices.'"
>
> Pet. Br., 4.

While amici use insurance terminology such as "actuarial equality" and "present value," their analysis is basically the same.

The problem, of course, is that while women as a group live longer *on the average* than men as a group, no individual woman is assured that she will collect

any of the "loaf of bread" set aside for her, much less all of it. Indeed, since more than 80% of the women do not live longer than their male counterparts, most women who work for the Department are plainly harmed by the policy: they receive less in expendable wages than men, but receive no more in total income in return.

Further, for some women, as for some men, present income will be worth more than future income because of their particular circumstances, even if they do live to a ripe old age; they may have a pressing need for the money now, but have other means of assuring later income. For these women, and for women who have a good reason to expect that they will die early —those with a progressive disease, a family history of early deaths, or a smoking or drinking habit, for example—this difference is a difference in present value as well as in ultimate outcome. Such women, like similarly situated men, would, given the choice, be likely to choose a higher present income.

What the Department's program really does is to distribute among women only, and not among employees generally, the cost of paying retirement benefits to those comparatively few women who live longer than the average male. This is doubly injurious to the woman whose life expectancy is equal to or shorter than that of the average person: not only is she denied the benefit of present income, but she must absorb a greater portion of the cost of subsidizing women who do live longer than if that cost were distributed among all employees. The harm occurs because each woman is

being treated as the average woman, even if she departs in her life expectancy or in her economic priorities from the average. The fact that a relatively few women may not be injured under the scheme does not make the harm to those who are adversely affected any less real.

Thus, this is not a situation, as petitioners and their supporters seem to suggest, in which plain gender-based differences in treatment cause no injury. And, when such differences do harm individuals, the fact that other individuals placed in the same classification are not hurt is not relevant to a finding that the discrimination is unlawful.

For example, in *Stanton v. Stanton,* 421 U.S. 7 (1975), this Court considered the validity of a state law establishing different ages of majority for men and women. In the particular case, the woman declared an adult at 18 had suffered discernible harm; she had lost the right to support payments from her father. But the same statute was of benefit to women in other situations. For example, achieving the age of majority conveyed the rights to enter into binding contracts and to sue in one's own name (421 U.S., at 17); men who did not have these rights until age 21 could find themselves unable to obtain commercial credit for purchases, or could lose legal rights due them because of the inability to procure legal enforcement. The double-edged character of this gender-based rule may have influenced the ultimate remedy in the case, in that it made it difficult to determine what rule Utah would have chosen had it selected a uniform

majority age. *See id.,* at 17. But the fact that injury did not occur to all women, or solely to women—or, indeed, that the rule was as likely to benefit as to harm the "average" woman—certainly did not lead to the conclusion that no cognizable inequity existed. Rather, this Court, applying a more relaxed standard of review than that applicable here (see Part I, *supra),* concluded that "no valid distinction between male and female may be drawn." *Id.,* at 17.

Cases dealing with state statutes or regulations designed to protect women from oppressive employment conditions have raised similar issues under Title VII. In some cases, women have asserted that protective laws violate Title VII because their application limits employment opportunities for women. E.g., *Manning v. International Union,* 466 F.2d 816 (6th Cir. 1972), *cert. denied,* 410 U.S. 442 (1973); *Bowe v. Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969). In other cases, however, men have protested that the statutes grant women more favorable employment conditions. E.g., *Burns v. Rohr Corp.,* 346 F.Supp. 994 (S.D.Cal. 1977). And, while courts deciding these cases have often noted that at least some of the protective laws were based upon statistically valid assumptions about differences between women and men (e.g., *Bowe, supra,* 416 F.2d at 716-18), the courts of appeals have uniformly declared the statutes violative of the equality requirement of Title VII. For, establishing a violation of Title VII does not require a showing that a given rule is inequitable or injurious to an entire group, or even to a majority of the group.

A rule is invalid if it operates on the basis of a forbidden classification and harms some members of the group, even if it is fair or beneficial to others.[9]

It is argued that *Gilbert* approved of the "actuarial equality" approach to Title VII in the insurance context. As noted, however, the *Gilbert* case concerned a policy that was neutral on its face, rather than one expressly drawn along gender lines. Only women who incurred the excluded additional risk of pregnancy actually received less than complete disability coverage; all other women received the same benefits as men at no extra cost.

In the present case, in contrast, the Department's policy penalizes all women because of the risk presented by a few. Thus, *Gilbert* would be parallel to the present case only if the General Electric Company had covered pregnancy, but had provided all women with benefits at a lower level than men because of the extra risk of disability then presented by women as a group. In that event, it seems to us, the "actuarial equality" on a *group* basis could not obscure the fact that, among non-pregnant persons, only women, and not men, would be paying the disability costs of pregnant women.

---

[9]We cannot conceive of a situation in which a plainly gender-based difference in treatment does not adversely affect some individual. For example, if the women here had received proportionately higher periodic benefits for their extra contributions, it might appear that there was a difference but no injury. But, to those women who did not want better retirement plans than men received because they preferred present income, and to those men who wanted the opportunity to have a higher retirement benefit even at a higher present cost, there would be harm.

Gilbert, therefore, did not involve the kind of evil with which Congress was most concerned when it prohibited employment discrimination: that persons in certain groups not be penalized for being members of that group. The discussion in *Gilbert* of actuarial equality was premised on the conclusion that no overt discrimination existed, and that the harm of being treated as an "average" woman rather than as oneself had consequently not occurred.[10]

B.

The group nature of insurance requires no special Title VII standard

The response of petitioners and amici appearing on their behalf to this analysis seems to be that insurance differs from all other situations in that insurance must operate on the basis of group averages, and that Congress therefore could not have

[10]Further, the Court in *Satty* explained that even as to the disparate impact analysis, the holding in *Gilbert* "did not depend on . . . evidence that the present actuarial value of the coverage was equal as between men and women." *Satty, supra,* slip op., at 7. Rather, the basis for the *Gilbert* decision was that "pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk, does not destroy the presumed parity of benefits . . . which results from the facially evenhanded *inclusion* of risks." 429 U.S. at 139.

The present case concerns no "additional risk unique to women." While there may be a difference in degree, men and women face the *same* risk—that they will live longer after retirement than the number of years of living expenses they could finance through savings. Thus, even if there is actuarial equality, the Department does not provide equal "aggregate *risk* protection" or "parity of benefits" (*Gilbert, supra,* 429 U.S. at 138-39; *see also Satty, supra,* slip op., at 7-8), since male employees can save the extra contribution amount and face old age in a better financial position than female employees.

intended to proscribe fringe benefit programs that treat men and women differently in situations in which pertinent statistically significant differences exist between men and women."[11]

But this is a nonsequitur; it does not follow from the indisputable fact that insurance must take into account large group norms that there is any "anomaly [in] attempting to apply traditional Title VII tests to insurance coverage offered employees as fringe benefits." Life Ins. Council Br., at 12. For, while "the fundamental principles of insurance are directed toward shifting economic risks of loss from an individual to a group" *(id.,* at 14), the issue here is not whether group averages may be used to distribute economic risks, but whether, because women live longer *on the average* than men, the total group may be subdivided so that a greater portion of the pooled risk is borne by women, in the form of higher contributions to the fund.

Practical experience alone demonstrates, despite petitioners' pronouncements to the contrary, that the operation of group pension plans does not inherently require individual members of any sub-group that presents a statistically significant higher risk to bear a proportionately higher share of the cost, either through higher contributions or through lower benefits.

[11]*See*, e.g., TIAA Br., at 26 ("[T]he continuing viability of such plans requires application of principles of risk classification . . . [S]uch classification is essential to the financial stability of any insurance plan.")

For example, the UAW has negotiated 1,500 pension plans covering almost 1.3 million employees. None of these plans differentiates on the basis of degree of risk of longevity in either the benefits paid employees when they reach ordinary retirement age or in differential employee contributions.[12]

Nor are the UAW plans unusual. Most of the pension plans negotiated by AFL-CIO affiliates are similar.

Indeed, as amicus Society of Actuaries admits, "most defined benefit plans in effect today . . . ordinarily provide for the payment of equal monthly pensions as a single life annuity at retirement, without regard to the sex of the retiring employees." Actuaries' Br., at 12. And, "defined benefit plans which provide for different contribution rates for male and female employees are exceedingly rare. . . ." *Id.*, at 18.

As the widespread existence of basically sex-neutral plans would suggest, the contentions of petitioners and their supporters that a sex-neutral approach to pension plans is "irrational" (Life Ins. Council Br., at 18; Actuaries' Br. at 23), economically impossible (Life Ins. Council Br., at 46; TIAA Br., at 26-27; Actuaries' Br., at 9-10), and fundamentally unfair (Life Ins. Council Br., at 14; TIAA Br., at 24; Actuaries' Br., at 10) are simply false.[13]

[12]The UAW plans do contain basic benefit differentials based upon length of service and salary, but none based upon any individualized or sub-group assessment of longevity.

[13]It may be true that it is the *practice* of private insurance companies to charge differential rates, or pay differential benefits, on the basis of sex. But the fact that something is done does not show that it is necessary. And, as discussed below, there are some economic differences between group employee benefit programs and individual insurance sales by private companies which indicate that whatever economic justification there may be for sex differentiation when purchase of insurance is voluntary does not apply when participation in a pension plan is a mandatory condition of employment.

1. *Rationality:* The first contention—that a sex-neutral plan is "irrational"—amounts to the claim that since the longer life expectancy of women as a group is statistically demonstrable, and since it is not possible to determine in advance which particular women will live longer, the only sensible approach is to treat women as a distinct sub-group for pension plan purposes. But, of course, there are many other simple ways in which one could divide a group of employees into sub-groups with statistically significant differences in life expectancy—for example, by smoking habits,[14] by race,[15] by state of residency,[16] or by age at onset of coverage.[17] In our experience, such differ-

[14]One study calculated that almost half the difference in life expectancy between men and women is actually attributable to the fact that men are much more likely to smoke. Rethorford, *The Changing Sex Differential in Mortality*, 104 (1975).

[15]*See* Actuaries' Br., at 11.

[16]The difference in life expectancy between residents of the District of Columbia and residents of Maryland is greater than the 4.3 year national difference between men and women. *See* U.S. Dept. of H.E.W., National Center for Health Statistics, *Vital Statistics of the United States* (December 14, 1977).

[17]Life expectancy in terms of age at death *increases* with age. *See* Metropolitan Life Ins. Co., *Statistical Bulletin*, at 10-11 (May, 1977). This is because all persons past a certain age have no possibility of dying at that age or younger, and people with lower death ages are therefore out of the pool that is available to compute average life expectancy. Retirement plans are concerned with the likelihood of living past the normal retirement age; this likelihood *increases* significantly for the reason just stated, with the age when first covered. Thus, a plan truly concerned with individual equity would charge higher contributions, or pay lower benefits, to workers older when they began working than to younger workers with equivalent years of service.

entiations are unheard of in group employee pension plans.

We are not suggesting here that the sex-differentiation would be any more valid under Title VII if other statistically significant indices of life expectancy were used as well. Rather, the point is that since this very pension plan, and other sex-differentiated pension plans, have operated successfully without subdividing potential beneficiaries into various other possible sub-groupings based on life expectancies, to denominate a sex-neutral approach as "irrational" or as requiring employers to ignore relevant and important considerations, is the result of "habit, rather than analysis or actual reflection . . . [,] the accidental byproduct of a traditional way of thinking about [sex differences]." *Califano v. Goldfarb*, 430 U.S. 199, 222-23 (1977) (Stevens, J., concurring.)

We are not contending that in setting undifferentiated contribution or benefit rates for the entire group of covered employees, actuaries may not consider the sex composition of the group. As the Society of Actuaries points out (Actuaries Br., at 19), such consideration is useful to establish the probable cost of various benefit levels. In practice, "the main determining characteristics [of cost] are the age composition, the service composition, the composition by sex and race, frequently the level of earnings, and what the probable future might hold for the particular group involved because of the changing economic picture." Fellers, "Pension Costs and Cost Experience," in Bureau of National Affairs, *Pensions and Profit Sharing*, 151 (3rd ed. 1964).

But the fact that it is useful to take sex as well as other factors into account in determining the benefits available to the entire group for a given cost, or the cost for given benefits, certainly does not indicate that benefits or costs, once determined, must be distributed by sex as well, or that it is "irrational" not to do so. Indeed, for reasons to be explained, it is the essence of group insurance, as opposed to individual insurance, that, to the degree possible, all members of the group be offered equal benefits at equal cost.

Moreover, even were it the practice, as it is not in most group insurance, to distribute benefits and costs according to sub-groupings demonstrating demonstrably different risks, it would still not be "irrational" to prohibit the application of this practice in particular instances. "[C]ertain classifications which may be perfectly feasible from an actuarial standpoint may be barred . . . for reasons of social policy. For example, black persons exhibit shorter longevity than white persons, but they are not charged a lower amount when they purchase [individual] annuities or a higher amount when they purchase life insurance." Actuaries' Br., at 11.[18]

In accordance with the principle that public policy considerations can prevent the use of certain classifications based on statistical showings that would

[18]TIAA claims that "at the higher ages (which are the ages relevant here), there is no significant difference in the longevity for white and non-whites." TIAA Br., at 6. While it is true that life expectancies after the usual retirement age, 65, are approximately equal for whites and non-whites, it is *not* true that this is the relevant question. Obviously, pension plans must concern themselves not only with how long people are likely to live after retirement but with whether they are likely to live long enough to retire at all. *See* n.17, *supra*.

otherwise be adequate, many of this Court's sex discrimination cases invalidating gender classifications,

> "have . . . rejected the use of sex as a decision making factor even though the statutes in question . . . rested on . . . predictive empirical relationships.
>
> "In both *Frontiero* [*v. Richardson,* 411 U.S. 677 (1973)] and [*Weinberger v.*] *Wiesenfeld* [420 U.S. 636 (1975)] [this Court] expressly found appellees' empirical defense of mandatory dependency tests for men but not for women to be unsatisfactory, even though it recognized that husbands are still far less likely to be dependent on their wives than vice versa. . . . It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business and one that *inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.* . . . In sum, the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the . . . tendencies of aggregate groups."
>
> *Craig v. Boren,* 429 U.S. 190, 202 and n. 13, 204, 208 (emphasis added).[19]

[19]The fact that the prohibition against *per se* gender-based discrimination is tested under Title VII by a stricter standard of scrutiny than under the Equal Protection Clause (see Part I, *supra*) only heightens the import of the equal protection cases in this context. If objective statistical significance is insufficient to override "the normative philosophy that underlies the Fourteenth Amendment," it is certainly insufficient to override the express prohibition of Title VII unless the statutory defenses apply.

Nor is the insurance context distinguishable because it is not possible to determine with any certainty *which* women (and men) will ultimately live longer than the average person. While it would have been possible, although administratively inconvenient, to determine dependency in *Frontiero, Wiesenfeld* and *Califano v. Goldfarb, supra,* in other cases it was difficult or impossible to discover in advance precisely which individuals, men and women, had the trait which allegedly justified the gender-based discrimination. In *Craig,* for example, "there [was] no apparent way to single out persons likely to drink and drive." 429 U.S. at 227 (Rehnquist, J., dissenting). Nonetheless, "injury to all of the young men of the state [cannot] be justified by visiting the sins of the 2% on the 98%." *Id.,* at 214 (Stevens, J., concurring).[20]

The same was the case in *Stanton v. Stanton, supra.* While it "may be true that girls mature earlier than boys" (421 U.S. at 14), there is probably no practical way for the state to determine which girls are more mature or which boys less mature, or to legislate on the basis of maturity rather than gender.

[20]A similar problem could arise under Title VII itself. Automobile insurance statistics show women on the average to be safer drivers than men. And, it may not be possible, even using other indices of safe driving, to determine which men present special risks. Nonetheless, we assume that an employer could not hire only male drivers. "Since some men are safe drivers and some women are not, this type of policy constitutes explicit sex discrimination." Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1174 (1971).

Indeed, this case differs from *Craig* and *Stanton* in that if, for some reason, it is felt to be important to the success of a particular plan to separate out higher and lower risk persons, there are simple means to do so other than sex classification. Title VII would have no effect, for example, upon plans imposing special, actuarially determined surcharges upon non-smokers, or upon persons living in Maryland rather than the District of Columbia, *see* n.n. 14 & 16, *supra*.[21]

Thus, we are not suggesting that Title VII requires "irrational" decision making. To the contrary, it requires only that one kind of classification, which is in no way necessary, not be used, because to do so would contravene the plain public policy that individual women may not be penalized because of "the . . . tendencies of aggregate groups" of women. *Craig, supra,* 429 U.S., at 208.

2. *Economics:* The second contention—that it is economically essential to take sex into account in distributing costs and benefits in pension plans—is, of course, also belied by the widespread practice of established plans, which do not pay lower benefits at retirement age to women and do not charge them more. It is nonetheless worth examining the economic argument closely, because petitioners and their supporting amici place such great reliance upon it.

---

[21]Even if more women than men, or more blacks than whites, do not smoke, or live in Maryland, there would be no *per se* discrimination under Title VII. *See Teamsters, supra,* 431 U.S. at 335, n.15.

The basic argument is that "[i]f individuals are forced to pay premiums which subsidize other persons' risks that are substantially greater than their own . . . they will eventually withdraw from the pool." TIAA Br., at 6; *see also* Actuaries' Br., at 9-10; Life Ins. Council Br., at 46. This theory is sensible to a degree when one is dealing with individual insurance sales.[22] But it entirely disregards a key ingredient of almost all employee group benefit plans, including this one: that participation by all employees is mandatory, and that adverse selection is therefore not a possibility. This factor explains both why sex-neutral employee pension funds are not collapsing as a result of their failure to discriminate against women, and why even sex discriminatory group pension plans such as the one in this case do not

---

[22]Even then, the theory does not dictate *which* of all possible statistically significant sub-groupings are to be separated out for differential pricing or benefits, and thus does not compel gender differentiation. It would be administratively impossible, and counterproductive to the basic purposes of insurance, to calculate rates on the basis of all, or most known determinants of risks. At some stage, the premium would become so individualized as not to represent any "pooling" at all. At no point do any of the amici contend that gender is the best single feasible determinant of longevity, and they therefore have not explained why it is necessary to distinguish on the basis of gender rather than on the basis of another factor or factors.

Also, the adverse selection theory depends in part on an entirely free, unregulated market, which insurance decidedly is not. That is, if all insurance were available only on a sex-neutral basis, adverse selection would not be possible, because those who withdraw from one pool could not join another more advantageous to them. This is why, presumably, the race differential in longevity has not led to wholesale bankruptcy of insurance funds, as amici's arguments would suggest.

differentiate in other ways according to degree of risk.[23]

Apparently, in recognition of the inapplicability of the adverse selection theory to mandatory employee group insurance, two attempts are made to apply this theory in the group insurance context.

The first suggestion is that low risk employees can adversely select by declining employment where there is a nondiscriminatory policy for benefits. But, it is absurd to suppose:

[23]This benefit of mandatory coverage also shows that the concept that *per se* discrimination in group employee benefit plans should be tested by whether similar effects would occur if the contributions were converted to wages and then used to purchase individual insurance or annuities is misleading. Once contributions are converted into wages, the advantages of mandatory group insurance are lost: the savings in administrative cost disappear but, more important here, the possibility of adverse selection reappears. Thus high risk individuals, male and female, may have to pay more than others, and some may not be able to get individual insurance at all.

Moreover, pensions as such are not even available on the private market. While individual annuities can be purchased, these have entirely different characteristics than most employee pension plans and receive the tax advantages of pension plans only to a limited degree. Thus, there is no individual market substitute for employee pension plans, as unions which have put increasing emphasis on bargaining for benefits rather than for wages well know.

The failure of the deferred compensation approach can be seen most clearly by considering the following hypothetical: Suppose an employer paid all women a certain wage, and paid all men a lower wage, with the difference being contributed to a pension fund mandatory for men but not available to women. For the reasons just explained, the women could not expect to purchase on the private market an actuarially equivalent pension. There would plainly be a Title VII violation, even though the employer's cost for men and women was the same. Thus, the amount of an employer's contribution to a pension plan cannot be the relevant factor in determining equality, and employee benefit plans must be looked at from the perspective of benefits received.

> "that a male [employee] would consider any such differential [in life expectancy] in light of the equal manner in which male and female [employees] have qualified . . . and in light of the equal daily human needs which both male and female annuitants have, and upon such consideration would [decide] whether to accept [an] offer of employment. . . ."
>
> *Reilly v. Robertson*, 360 N.E.2d 171, 177 (Ind. Sup.Ct. 1977).

While potential pension benefits may be a factor in determining whether to accept a particular job, it is only one of many factors; and, as to pensions, the basic concern will be whether the pension available is a good one, not whether it could be better by a tiny fraction if other employees received less. Furthermore, if our position in this case prevails, essentially all employment plans would be sex-neutral, so that adverse selection by choosing jobs that have sex discriminatory pension plans would not be a possibility.[24]

The second suggestion is that, while individuals cannot self-select, *groups* will do so—that is, employers with a primarily male work force will self-insure rather than purchase annuities from insurance companies at prices that reflect sex-neutral mortality

[24]The alternative of choosing a job without a pension plan and hoping to purchase a better annuity for oneself on the private market with resulting extra income is ordinarily not a possibility. See n.23, *supra*. The pension benefits received by men under the UAW and AFL-CIO affiliates' plans, for example, are incomparably better than individual annuities they could purchase with the contribution amount.

rates, thus altering unfavorably the risk composition of insured plans as a whole. *See* Life Ins. Council Br., at 46-47.[25] But, as noted earlier, we are not advocating that the contribution rates charged for the group as a *whole* may not take into account the sex composition of the work force. Our contention is only that *individuals* may not be charged more, or receive less, because of sex. Thus, for those plans funded through private insurance, there is no reason why rates cannot reflect the risk presented by each employer *group* as compared with other groups covered by the same insurer. Heavily male plans need not be disfavored in any way if our position prevails, and they will have no reason to abandon the insurance scheme.[26]

3. *Subsidization*: The final reason it is claimed that employee benefit schemes cannot be subjected to ordinary Title VII analysis is that to do so would force employers "to take some of the funds contributed by and for the men and pay those funds to the women," and that this would be "discriminatory in the extreme." TIAA Br., at 24; *see also* Life Ins. Council Br., at 44-45; Actuaries' Br.. at 10-11. But, of course, "subsidy" by those who do not incur a

[25]This argument, we take it, applies only to pension plans that are insured rather than trusteed. *See* Actuaries Br., A-7.

[26]There is another, practical factor as well which invalidates the Life Insurance Council's analysis: most large plans already self-insure, while most small plans cannot economically do so. Actuaries' Br., at 22; Life Ins. Council Br., at 46 n. 100. Thus, for most of the plans currently funded through insurance, withdrawal from the risk pool is not a possibility.

risk, of those who do, is at the core of insurance. Thus, unless insurance itself is unfair, there is nothing inherently inequitable when funds derived from contributions on behalf of one set of individuals are used to pay benefits to another set of individuals who live longer. That is why pension plans work at all.

Moreover, mandatory group benefit programs, in particular, rely on cross-subsidization of high risk persons by low risk persons. Because participation is mandatory, it is possible, at least in a large enough plan, to assume a representative cross-section of risks, and therefore to offer insurance to individuals who, because of the high risk they represent, could not obtain adequate benefits on the private market at an affordable cost.

An example may be useful here. Age at onset of coverage is a very strong predictor of age at death. That is, persons who are twenty-five can expect to live to be 74.8; persons who are forty can expect to live to be 75.8; and sixty year old people can expect to live to be 79.4. Metropolitan Life Insurance Co., *Statistical Bulletin,* at 10-11 (May, 1977); *see* n. 17, *supra.* Thus, persons who begin working at younger ages, or are younger when a pension plan begins, are plainly "subsidizing" those who are older at the outset. Yet, many new employee pension plans are designed in a way which exacerbates this imbalance: workers are given past service credit for pension calculation purposes even for years in which there were no contributions, and the funding of past service liability is then amortized over time.

The general perception is not that this system is unfair, but that it is an example of the benefits of group employee pension plans. For, in this way, it is possible to provide fair pensions for older workers in a manner which would be impossible with individual annuities purchased on the private market.[27]

Thus, the assertion that it is "discriminatory in the extreme" to have sex-neutral pension plans cannot be based on any fundamental inequity in providing equal benefits to higher and lower risk persons. Rather, that argument amounts to the contention that low risk *men* are somehow *entitled* to be assured that funds contributed "by and for them" are used to finance pensions only for high risk—for example, older—men, and not for high risk women as well.[28] Nowhere is it explained why low risk individuals who at any rate will be "subsidizing" others in the risk pool, have any fundamental right to be certain

[27]There are other prevalent examples as well. One is the practice of providing survivor's benefits at no extra cost to the employee. Plainly, where such benefits are available, single employees are "subsidizing" married employees.

Another instance is the recent negotiation of plans providing for full, or nearly full, retirement benefits after a specified number of years of service, regardless of age. Under such plans, persons who begin working at a young age receive benefits actuarially superior to those who begin working later, for they can receive benefits for many years longer. For example, the UAW "big three" automobile industry plans would permit an employee who started work at eighteen to retire with full pension benefits at 48.

[28]Under a sex-neutral plan, the 84% of men who live as long as 84% of women and therefore derive the same benefits from the plan as such women surely have no possible complaint. Indeed, they derive an extra benefit from the Department's present plan solely because other men don't live as long as some women.

that the group they are helping to fund is composed of their sex.

Thus, the repeated but unexplained assertions that sex-neutral benefits are somehow unfair graphically reflect the kind of rigid sex-classification approach to employment relationships which Title VII was designed to cure. If it is not "discriminatory in the extreme" for smokers to "subsidize" non-smokers, blacks to "subsidize" whites, residents of the District of Columbia to "subsidize" residents of Maryland, or younger workers to "subsidize" older workers—indeed, if this pooling of higher and lower risks is the central advantage of group employee pension plans—we fail to perceive any inherent inequity if the same process occurs between men and women.

4. *Indices of Legislative Intent:* Since the application of traditional Title VII sex discrimination standards to employee benefit plans is not inherently unworkable, there is no reason whatever to assume that ordinary Title VII coverage was not intended. A specific indication of purpose would have been necessary only if there had been a purpose *not* to apply the usual analysis to benefit programs.

There are, nonetheless, two suggestions that the language used in Title VII *was* generally understood by Congress to prohibit gender-based discrimination in pension plans. First, when Title VII was originally under consideration, there were proposals to include a ban on age discrimination as well as on race, sex, religious, and nationality discrimination. These proposals were rejected precisely because it was perceived

that the language of § 703(a) of Title VII would then prevent age distinctions in pension and retirement plans. *See* U.S. Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of the Civil Rights Act of 1964,* at 3174 (1968).

Three years later, the Age Discrimination in Employment Act was passed. 29 U.S.C. § 620 *et seq.* Its affirmative prohibitions are cast in essentially the same language as those in § 703(a) of Title VII. *Compare* 29 U.S.C. § 623(a) (1) and (2) with 42 U.S.C. § 2000e-2(a) (1) and (2). Unlike Title VII, however, it contains an explicit exception for "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter." 29 U.S.C. § 623 (f) (2).

In *United Airlines, Inc. v. McMann,* ..... U.S. ....., 46 U.S.L.W. 4043 (1977), this Court considered at length the history and purpose of this express exception in the Age Discrimination in Employment Act. From the materials there surveyed, it is clear that one reason the exception was thought necessary was the belief that without it, the bill would "not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired." Hearings of S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., at 53 (1967), quoted in *McMann, supra,* ..... U.S. at ....., 46 U.S.L.W., at 4045. Section 623 (f) (2) was therefore added, to assure that "[a]n employer will not be

compelled . . . to afford to older workers exactly the same pension, retirement, or insurance benefits he affords to younger workers." Remarks of Senator Javits, 113 Cong. Rec. 31255 (1967).[29] Thus, at least in 1967 and, presumably in 1964 when it rejected an "age" addition to Title VII because of the possible effect upon pension plans, Congress understood perfectly well that, without a specific exception, the language of Sections 703(a)(1) and (a)(2) of Title VII requires equal pension benefits and employee contributions for those classifications which are covered by the Act.

Second, and related, was a specific attempt in 1970 to add a parallel exception to Title VII itself. In that year, a bill to amend Title VII was passed by the Senate after extensive hearings. A similar bill was reported out by the House Committee on Education and Labor, but never reached the House floor. Those bills, S. 2453 and H.R. 17555, included the coverage for public employees, such as respondents here, which was eventually added by the 1972 amendments. *See* H.R. Rep. No. 92-238, 92nd Cong., 1st Sess., at 2 (1971).

When H.R. 17555 was under consideration by the General Labor Subcommittee, Congressman Esch proposed an amendment which would have provided that:

> "[I]t shall not be an unlawful employment practice to observe a pension or retirement plan, the terms or conditions of which . . . provide for

[29]Senator Javits was the minority floor manager of the bill. *See* McMann, *supra,* ..... U.S. at ....., 46 U.S.L.W., at 4049 (Marshall, J., dissenting).

> . . . reasonable differentiation between employees, provided that such pension or retirement plan is not merely a subterfuge to evade the purposes of this title."

The Subcommittee accepted this amendment, which was quite similar in language, and seems to have been similar in intent, to the Age Discrimination Act exception enacted three years earlier. Before consideration by the full Committee on Education and Labor, however, the Representative who had been most responsible for persuading other members to take seriously the addition of sex discrimination to Title VII, Congresswoman Griffiths, wrote to the members of that Committee, explaining why the Esch amendment would be contrary to the premises of Title VII and had no practical necessity:

> "The effect of [this] amendment is so startling that it is hard to believe it. . . . It . . . simply repeals Title VII so far as concerns pension and retirement plans. . . .
>
> Title VII of the 1964 Civil Rights Act . . . makes it unlawful for any employer "to discriminate against any individual" on the basis of race, color, religion, sex or national origin with respect to "compensation, terms, conditions, or privileges of employment." The employee's option to retire at a certain age is clearly a "privilege" of employment, and the terms and benefits of a retirement plan are certainly derived from the employment relationship. Therefore, Title VII plainly prohibits discrimination with regard to pension and retirement plans on the basis of race, color, religion, sex, or national

> origin. Since the same language of Title VII applies to race discrimination as to sex discrimination, it is clear that both race and sex discrimination are not permissible with respect to pensions and retirement plans. . . .
>
> Sometimes I hear the argument that sex distinctions . . . are reasonable because of sex differences in actuarial mortality tables. Yes, women do live longer than men. . . .
>
> [But] there is no valid national need for the Esch amendment. Over 95 percent of all pension plans under collective bargaining reported pursuant to the Welfare and Pension Plans Disclosure Act contain no distinction between men and women workers. The other 5 percent contained sex differentials only as to the age required for participation in the pension plan or for retirement. . . . Furthermore, industry at present rarely makes sex the basis for differences in the pensions paid to the retired employee, or in the amount of credited service and earnings necessary to receive such benefits. Yet the Esch amendment would sanction and encourage sex discrimination in all of these aspects, and others, of pension and retirement plans, "notwithstanding any provision of Title VII." In [truth] the Esch amendment is so broad as to constitute virtually a blank check for sex discrimination in pension and retirement plans. . . .
>
> Since the Federal Civil Service and Social Security retirement systems operate effectively without broad scale sex discrimination, I see no reason why non-Federal pension and retirement plans cannot also operate effectively without sex discrimination. . . .

> The Esch amendment has no place in a country dedicated to the proposition of equality of opportunity regardless of race, color, religion, sex or national origin. It should be soundly rejected."
>
> Letter and Analysis by Martha W. Griffiths concerning the Esch amendment to H.R. 17555, 91st Cong., 2d Sess., in Congressional Information Service, *Discrimination Against Women,* at 380-382. (Bowker, Ed., 1973).[30]

The Esch amendment was apparently deleted by the full Committee in response to these arguments.[31] And, when the following Congress again considered, and passed, amendments to Title VII, including the amendment covering public employees which gave rise to the present cause of action, there was no attempt, as far as we can determine, to exclude pension plans from the Act's coverage.

In sum, the various arguments why Congress could not have intended to require that the usual Title VII analysis apply to pension plans all fail upon analysis, and there are specific indications that the language of Title VII was understood to require equality in both periodic benefits and employee contributions. Consequently, unless there is an applicable statutory exception, the Department's pension plan is invalid.

---

[30]Congresswoman Griffiths' letter and analysis contain a persuasive discussion of some of the issues involved in this case and are therefore reproduced in their entirety in the Appendix to this brief.

[31]The bill as reported to the House floor contained no provision exempting pension plans from the full strictures of Title VII. *See* H. Rep. No. 91-1434, 91st Cong., 2nd Sess. (1970).

III

THE BENNETT AMENDMENT TO TITLE VII DOES NOT PERMIT EXPRESS GENDER-BASED DIFFERENCES IN EMPLOYEE BENEFIT PLANS

Since petitioners' pension plan entails express gender-based discrimination, and since there is no persuasive reason to believe that Congress intended special Title VII standards to apply to such discrimination in the insurance context, the plan must be found to violate Title VII unless it falls within one of the Act's specific exemptions. Petitioners and their supporting amici urge that the Bennett Amendment, which permits gender-based wage disparities under Title VII to the extent they are "authorized" by the Equal Pay Act, provides such an exemption.[32] An analysis of the Equal Pay Act reveals, however, that it does not "authorize" gender-based disparities in pension contributions or benefits.

The Equal Pay Act is Section 6(d) of the Fair Labor Standards Act, 29 U.S.C. §206(d). It provides in relevant part:

> "No employer having employees subject to any provisions of this section shall discriminate within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establish-

---

[32]The Bennett Amendment provides:

> "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29."
>
> 42 U.S.C. §2000e-2(h).

ment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on the jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . ."

Thus, gender-based discrimination in wages must satisfy two tests in order to be "authorized" by the Equal Pay Act and thereby exempted from Title VII under the Bennett Amendment: *First,* the discrimination must fall within the scope of the Equal Pay Act, i.e., it must affect "wages" as that term has been defined for purposes of the Fair Labor Standards Act, of which the Equal Pay Act is a part. *Second,* the disparity in wages must be authorized under one of the four exceptions set forth in the Equal Pay Act.

A.

The equal pay act does not cover employee benefit plans

Petitioners and their supporting amici have assumed the satisfaction of the first test, and have consequently centered their Equal Pay Act discussion on the second. It is our view, however, that benefit plans of the kind here at issue are not within the purview of the Equal Pay Act at all, and that the Equal Pay Act therefore cannot "authorize" any disparities with regard to them. For, it is quite plain

that such plans are not "wages" for purposes of the minimum wage provisions of the Fair Labor Standards Act ("FLSA"), and that FLSA concepts apply under the Equal Pay Act.

As originally proposed, the Equal Pay Act would have been an independent statute. Both the House and Senate Committees to which the proposed legislation was referred, however, reported the bill out as an amendment to the FLSA. This was done in order to permit incorporation of longstanding definitions in and interpretations of the FLSA, so that the administration of the new Act would be facilitated. *See* S. Rep. No. 176, 88th Cong., 1st Sess., at 3 (1963); H. Rep. No. 309, 88th Cong., 1st Sess., at 2 (1963).

For example, the House Committee on Education and Labor explained that the bill was made a part of the FLSA "because both industry and labor have a long-established familiarity with existing fair labor standards provisions." H. Rep. No. 309, *supra,* at 2; *see also* S. Rep. No. 176, *supra.* And a number of Committee members including Congressman Goodell, the author of the amendment placing the Equal Pay Act in the FLSA, pointed out in their Supplemental Views that:

> "The definitions and interpretations of the Fair Labor Standards Act apply. These have been court tested and are generally understood by business and labor."
>
> H. Rep. No. 309, *supra,* at 8; *see also* remarks of Senator McNamara, floor manager of the Senate bill, 109 Cong. Rec. 8914.

The concept of what constitutes "wages" is, of course, central to both the minimum wage provisions of the FLSA and to the Equal Pay Act. Since Congress inserted the Equal Pay Act into the very section of the FLSA that prescribes the minimum wage, Section 206, the definition of wages generally applicable under Section 206 must be pertinent to the interpretation of the Equal Pay Act. And mandatory employee contributions to employee benefit plans are *not* considered wages for the purposes of the minimum wage provisions of the FLSA. Under Section 206 of the FLSA, as this Court pointed out in *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 707-08 (1945), "wages" are resources available for immediate use to meet daily needs:

> "[The Fair Labor Standards Act] constitutes a Congressional recognition that failure to pay the statutory minimum *on time* may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce. . . . Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date." (emphasis added).

The Court stressed the importance of *"prompt payment* to workers of wages." *Id.* at 707, n. 20.

Obviously, neither contributions to pension plans nor benefits to be received years later are available to meet present daily needs. For this reason, the Labor Department has consistently maintained, and courts

have agreed, that an employer may not count pension contributions made pursuant to an involuntary plan as "wages" for purposes of determining whether the employee has in fact been paid the minimum wage. *See* 29 C.F.R. §531.40; *see Brennan v. Modern Chevrolet Co.,* 363 F.Supp. 327, 332 (N.D.Tex. 1973).[33]

Aside from Congress's general intention to incorporate FLSA definitions and concepts into the Equal Pay Act, there are several specific indications that pension plans are not "wages" for purposes of the Equal Pay Act. First, Congress had the same concern with immediate purchasing power when it enacted the Equal Pay Act as when it passed the FLSA originally. *Compare* "Declaration of Purpose," Equal Pay Act, Section 2(a)(1), 77 Stat. 56, with "Declaration of Policy," Section 2(a), Fair Labor Standards Act of 1938, 52 Stat. 1060. *See also Shultz v. Wheaton Glass Co.,* 421 F.2d 259, 265 (3rd Cir. 1970). As Senator Hart stated:

> "We have long passed the time when women were allegedly working for 'pin money.' Women are working to earn a living, to support families or to contribute to the family's ability to send the children to college—in addition to whatever

---

[33] *Cf. Brennan v. Veterans Cleaning Service,* 482 F.2d 1362, 1369 (5th Cir. 1973) ("the minimum wage must normally be paid 'free and clear'."). *See also,* 29 C.F.R. §531.35.

Section 3(m), 29 U.S.C. §203(m), the definition section of the FLSA, does recognize that "wages" need not be cash. It defines "wage" to include the furnishing of "board" and "lodging" by an employer. This definition is quite consistent with the view that the focus of the FLSA is on immediate spending power. For, providing the sort of employee benefit counted as wages under §3(m) is the functional equivalent of cash: it furnishes directly the daily necessities for which cash would otherwise be used.

personal sense of achievement may be involved. The supermarket does not have a special price on its groceries for women, the doctor does not have a special rate for them, their rent is not based on sex. Why then do we allow a pay differential to continue which gives them a smaller paycheck than others performing the same work?"

109 Cong. Rec. 8916 (1963).

Second, the Senate Committee Report recommending enactment of the Equal Pay Act specifically supports the notion that pension plan contributions were not considered to be "wages" under the Act. The Report points out that employers expressed concern about having to pay women the same wages as men because of allegedly higher costs associated with the employment of women. A key example was pension plan contributions:

"Some employees stated that the cost of their pension plans were higher for women than men because of . . . the longer life span of women in pension benefits."

S. Rep. No. 176, 88th Cong., 1st Sess., 4 (1963).[34]

If pension plans were considered "wages" under the Act, this concern would have been invalid, since the combination of women's lower wages and the higher pension contributions from employers would have

[34]Petitioners and some amici assert that by noting this concern, Congress approved of differential pension benefits for women. As we show later (*infra*, at 57-59), the quotation read in context leads to the opposite conclusion.

amounted to the same total "wages" received by men, thus eliminating the issue of "wage" discrimination.

Finally the Labor Department has always recognized that the term "wages" as used in the Equal Pay Act:

"is considered to have the same meaning it has elsewhere in the [Fair Labor Standards] Act. . . . As a general rule, in determining compliance with the equal pay provisions, the wages paid by the employer will be calculated pursuant to the same principles and procedures as have traditionally be [sic] followed in calculating such wages for purposes of determining compliance with the *minimum wage* provisions of the Act."

29 C.F.R. §800.110 (emphasis added).[35]

[35]On the precise question of whether pension plan contributions or benefits are "wages" for Equal Pay Act purposes, the Labor Department's position is less clear. On the one hand, 29 C.F.R. §800.116(d), the regulation upon which petitioners and their supporters principally rely, seems to suggest that they are wages, although all that is affirmatively said is that certain kinds of inequalities in pension plans are not "prohibited" by the Act. However, on February 3, 1967, some 18 months after Section 800.116(d) was promulgated, the Department published another regulation entitled "Particular Types of Payments as Wages." It provides:

"Study is still being given to some categories of payments made in connection with employment subject to the Act, to determine whether and to what extent such payments are remuneration for employment that must be counted as part of wages for equal pay purposes. These categories of payments include . . . contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, *retirement*, life, accident or health insurance or similar benefits for employees."

29 C.F.R. §800.113 (emphasis added).

The Fifth Circuit has also expressed doubts that the Equal Pay Act covers fringe benefits similar to those in the present case.

Thus, while pension plan contributions and benefits are considered "compensation, terms, conditions and privileges of employment" under Section 703(a)(1) of Title VII[36] they are not considered "wages" under the Equal Pay Act, because they are not wages for purposes of Section 206 of the FLSA. Since pension plans are outside the scope of the Equal Pay Act, the Bennett Amendment, which applies only to discrimination in compensation authorized by that Act has no bearing on this case.[37]

In *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719, 723 n.1 (1970), that court states:

> "[I]t is far from clear that standard types of fringe benefits are eligible for inclusion in 'equal pay' determinations."

[36]"Congress intended Title VII to reach retirement plans as conditions of employment just as such plans are viewed as employment conditions under the National Labor Relations Act." *Peters v. Missouri-Pacific Railroad Co.*, 483 F.2d 490, 492 n.3 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973); *Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90, 95 (3d Cir. 1973); *Bartmess v. Drewrys*, 444 F.2d 1186, 1188-1189 (7th Cir. 1971); *cf. Inland Steel Co. v. National Labor Relations Board*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

[37]In *General Electric Co. v. Gilbert, supra*, the Court may have indicated that *disability* benefits under a *self-insurance* plan were wages under the Equal Pay Act. Unlike the pension contributions and benefits at issue here, however, the disability benefits in *Gilbert* were *temporary* wage substitutes similar to those payments described as Equal Pay Act wages under 29 C.F.R. §800.110, and not, as here, "contributions irrevocably made by an employer to a trustee or third person." 29 C.F.R. §800.113, promulgated the same day as §800.110. In addition, to the best of our knowledge, neither the parties nor the amici in *Gilbert* presented the Court with the issue of whether such benefits were in fact within the scope of the Equal Pay Act.

B.

If employee benefit plans are covered by the Equal Pay Act, that Act does not "authorize" express gender-based differences in such plans

Should the Court disagree with the preceeding analysis, it will have to determine whether the Department's gender-based disparities in pension contributions are "authorized" by one of the four "exceptions" to the Equal Pay Act.[38] Otherwise, the Bennett Amendment would not exempt the discrimination from Title VII.

1. *Exception (iv) to the Equal Pay Act:* The first three exceptions to the Equal Pay Act authorize wage disparties based on seniority, merit, and productivity

---

[38]While ordinarily the Court could expect to be aided in making this determination by administrative practice, the agency regulations and guidelines applicable to this case are an internally contradictory morass, unhelpful to a decision on the pertinent questions. The Department of Labor's regulations simultaneously state: (1) that it is not clear that contributions to employee benefit funds such as this one are covered by the Equal Pay Act at all (29 C.F.R. §800.113); (2) that, perhaps, such plans *are* covered, but they are valid if the cost to the employer is equal for each sex even if benefits are not (29 C.F.R. §800.116(d)); (3) that it is, in general, not permissible under the Equal Pay Act for an employer to pay lower benefits ("wages") to members of one sex than members of another sex because of higher costs incurred on behalf of that sex as a group (29 C.F.R. §800.151); (4) that any wage differential is invalid under the Act if gender plays any part in its rationale (29 C.F.R. §800.142). And, to add to the confusion, the Department of Labor maintained in its brief amicus curiae in the court of appeals that in this case the Equal Pay Act was violated, but that if the employer had paid women lower benefits instead of requiring unequal employee contributions, it would not have been.

The EEOC, on the other hand, maintains unambiguously that *only* an equal benefits approach is permitted. 29 C.F.R. §1604.9. Since the two agencies whose interpretations are pertinent seem to disagree, and since at least one of those agencies does not even have an internally consistent approach, the best course, we believe, is for the Court to disregard all of the administrative interpretations and undertake the task of construction directly.

and do not apply to this case. 29 U.S.C. § 206 (d). Petitioners and their insurance supporters rely on the fourth, which permits disparities "based on any other factor other than sex." *Id.* By its very terms, however, exception (iv) does not apply to policies such as the one at issue here that are based on overt gender-based discrimination: overt discrimination is necessarily discrimination based on sex, not on a "factor other than sex."

Petitioners maintain, however, that exception (iv) must encompass policies that are not facially neutral but that correlate in a statistically significant fashion with one gender or another. Their argument is that if an employer does not intend to treat women and men differently, no discrimination "on the basis of sex" would exist, and an affirmative defense based on facially neutral principles would be unnecessary. Thus, petitioners contend, unless their view is accepted, exception (iv) would be meaningless.

This argument is belied not only by the common sense notion that a "factor other than sex" cannot be "femaleness" or "maleness," but also by the structure of the Equal Pay Act and its legislative history. The Act does not simply proscribe discrimination "on the basis of sex"; it *explicitly* defines that concept as:

> "paying wages to employees of one sex . . . at a rate less than the rate at which he pays wages to employees of the opposite sex."
>
> 29 U.S.C. § 206 (d).

The plain words of the statute make it an offense to pay a woman employee in a particular job less

than a male employee in the same job, unless there is an explanation based on seniority, merit, productivity, or "any other factor other than sex." Even without an announced policy or conscious decision to differentiate on the basis of sex, then, an employer violates the Equal Pay Act when he pays men and women in the same job different wages and has no explanation for the disparity "other than sex." Thus, the Equal Pay Act, like Title VII, not only prohibits *explicit* gender-based discrimination, but also provides that showing a gender-linked effect, or, in Title VII terms, a "disparate impact," suffices to make out a prima facie case and to shift the burden to the employer[39] to provide a non-gender-based reason for the disparity.

A hypothetical example of a "disparate impact" case concerning wage disparities in the pension context illustrates the point: If the contribution of individual employees were tied not to the employee's sex as in the present case, but rather to sex-neutral factors (e.g., age, family history, health, smoking habits), and if those with higher risks and hence higher contributions nonetheless turned out to be entirely or primarily women, the employer would be confronted with a prima facie case of gender discrimination premised upon "disparate impact." In that event, exception (iv) would provide him with the defense that the wage differential was based on

---

[39]Under the Equal Pay Act, once it is shown that employees of one sex are paid at a different rate than employees of the other, "the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions." *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974).

"factor[s] other than sex," namely the sex-neutral criteria set forth above.

Both the legislative history of the Equal Pay Act and the Labor Department's implementing regulations are consistent with our view of the statute in general, and of the role of exception (iv) in particular. The House Committee Report closely ties exception (iv) to the other three, more specific sex-neutral exceptions:

> "As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded."
>
> H. Rep. No. 309, *supra*, at 3.

The Labor Department offers the following additional examples of factors that would justify wage differentials: "incentive payments . . . longevity raises . . . temporary assignments . . . training programs . . . temporary and part-time employees." 29 C.F.R. §§ 800.145-800.150. These exception (iv) factors, and exceptions (i), (ii), and (iii), all share the characteristic of being sex-neutral, and they differ on that ground from the factors cited by petitioners in the present case as reasons for their gender-based disparity in employee pension contributions.[40]

[40] 29 C.F.R. §800.142 provides:

> "Sex must not be a factor in excepted wage differentials. While differentials in the payment of wages are permitted when it can be shown that they are based on a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or on any other factor other than sex, the requirements for such an exception are not met unless the factor of sex provides *no* part of the basis for the wage differential." (emphasis added).

This view, it appears to us, was accepted in *Corning Glass Works, supra,* where the Court held that even a shift differential is not a "factor other than sex" if, at the outset, women were barred from the higher paying shift.

Thus, Congress intended exception (iv) to the Equal Pay Act to include only sex-neutral factors, and it has consistently been interpreted in this manner. Many "factors other than sex" are encompassed within exception (iv) as thus interpreted, and petitioners' argument that only their strained construction of the language of the Act gives it any meaning is therefore without merit.

2. *Legislative intent as to pension plans:* While the Congressional purpose with respect to the general role of exception (iv) is quite clear, the legislative history upon the precise question of explicit gender-based differences in employee pension plans is sparse.

The only statements concerning sex-differences in employee benefit programs contemporaneous with the passage of the Equal Pay Act occurred in the context of a larger dispute not directly relevant here, concerning whether to regard generally higher costs of employing women as a "factor other than sex" justifying wage differentials. Petitioners and their supporters argue, citing carefully selected passages from the Senate Report and House floor debate on this question, that the Congress specifically intended to allow disparities in pension contributions under exception (iv).

See Pet. Br., at 16-17; TIAA Br., at 34; Life Ins. Council Br., at 41. When these passages are read in their original context, it is clear that Congress reached the opposite conclusion.

For example, after quoting the Senate Report's comment that "some employees stated that the cost of their pension and welfare plans were higher for women than men . . . because of the longer life span of women in pension benefits," (TIAA Br., at 34), TIAA concludes: "the Report then stated that such differences in cost would constitute a factor other than sex justifying a differential in wages." *Id.* When the quotation is read in context, however, we learn that the Committee *rejected* the notion that higher pension costs for women alone would justify a disparity. The Committee addressed the employers' concerns as follows:

> "This question of added cost resulting from the employment of women is one that can be only answered by an ad hoc investigation. Evidence was presented to indicate that while there may be alleged added costs, these were more than compensated for by the higher productivity of women against men performing the same work and that the overall result for the employer was a lesser production cost than would result from the hiring of only men. Furthermore, questions can legitimately be raised as to the accuracy of defining such costs as pension and welfare payments as related to sex. It has been pointed out that the higher susceptibility of men to disabling injury can result in a greater cost to the em-

> ployer, and that these figures as to health and welfare costs can only be applied plantwide. It may be that it is more expensive to hire women in one department but it is more expensive to hire men in another, and *overall* cost figures may demonstrate conclusively that the employer has made a sound decision to hire women and pay them on an equal basis.
>
> It is the intention of the committee that where it can be shown that on the basis of *all* of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential, the Secretary can permit an execption similar to those he can permit for a bona fide seniority system or other exception mentioned above."
>
> S. Rep. No. 176, 88th Cong. 1st Sess. 4 (1963) (emphasis added).

Similarly, petitioners and the American Council of Life Insurance rely on remarks made by Representative Goodell and Thompson as confirmation of their view that Congress intended to allow pension discrimination because of the higher cost of providing such coverage for women. Pet. Br., at 17; Life Ins. Council Br., at 41. As in the case of the Senate Report, however, the context of the two Representatives' remarks makes clear that their position was that, for costs to be considered an exception (iv) factor, the employer would have to analyze *all* costs, not just pension costs, and compare any overall cost

differential with possible differences in productivity. *See* 109 Cong. Rec. 9206-9208.[41]

The one other bit of legislative history on the question of gender-based disparities under the Equal Pay Act in employee benefit programs is a comment by Senator Humphrey following the passage of the Bennett Amendment. At that time, a year *after* the passage of the Equal Pay Act, Senator Humphrey stated in response to a question by Senator Randolph that "differences of treatment in industrial benefit

[41]The Labor Department's view, which we agree is the only sensible interpretation of the Act, is that the legislative history, when taken as a whole (*see* H. Rep. No. 309, *supra*), does not recognize even aggregate cost differentials between men and women as an exception (iv) justification. *See* 29 C.F.R. §800.151. This regulation on the subject convincingly points out:

> To group employees solely on the basis of sex for purpose of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purposes of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex. . . . *Id.*

But the dispute regarding the aggregate cost issue is not here relevant. For, under either view, petitioners have failed to provide satisfactory justification for their use of gender in determining employee pension contributions: they have neither attempted to provide a sex-neutral rationale, nor have they produced any evidence that the pension disparity resulted from a detailed cost and productivity study that found that, in the absence of the disparity, the Department would incur higher overall costs in employing women. Indeed, the UAW and the AFL-CIO affiliates have found that the overall cost of employing men is usually higher than the cost of employing women, due to such factors as greater numbers of dependents for fringe benefit purposes, more expensive life insurance, and greater numbers of work-related disabilities.

plans, *including earlier retirement options for women*" were permissible under the Equal Pay Act. 110 Cong. Rec. 13663-64 (1964) (emphasis added). With due respect for Senator Humphrey, who surely ranks among the outstanding legislators to serve in the United States Senate, his comment reflects a misunderstanding of the Equal Pay Act. That Act deals only with *wage* discrimination; it has nothing to do with such matters as "early retirement options for women." *See* 29 U.S.C. § 206(d).

The Senator's inaccurate recollection of the Equal Pay Act is more easily understood when we remember that Senator Randolph questioned him in his role as "effective manager of the pending bill" (Title VII), one on which he clearly had special expertise. 110 Cong. Rec. 13663-64. Yet the question concerned an interpretation of the Equal Pay Act, not Title VII. His comments on the coverage of the Equal Pay Act cannot be construed as part of *its* legislative history. And, since the Bennett Amendment simply incorporates the Equal Pay Act, it is the intent of Congress when it passed *that* Act that must control.

[42]Two additional points concerning Senator Humphrey's remarks deserve mention. First, it appears from the examples given by Senator Randolph that Senator Humphrey understood the Senator to be referring to employment policies that accorded women special protections, such as the choice of early retirement, not policies that cause a women to receive lower wages for equal work. Second, just last term in *Califano v. Goldfarb*, 430 U.S. 199 (1977), this Court found unconstitutional the Social Security Act's differential treatment of widows' and widowers' benefits, another of the examples included in the Randolph-Humphrey colloquy. 110 Cong. Rec. 13663-64. (1964).

Thus, Section 703(h) of Title VII, the only defense possibly pertinent here is, upon analysis, not applicable. Even if pension contributions and benefits are, as we contend they are not, within the scope of the Equal Pay Act, the overt gender-based disparity in the Department's pension plan is not authorized by that Act and therefore is not exempted from Title VII by the Bennett Amendment.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Dated, December 21, 1977.

Respectfully submitted,

J. ALBERT WOLL
ROBERT C. MAYER
MARSHA S. BERZON
736 Bowen Building
815 - 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 - 16th Street, N.W.
Washington, D.C. 20006
Attorneys for AFL-CIO

JOHN A. FILLION
ANNE M. TREBILCOCK
8000 East Jefferson Avenue
Detroit, Michigan 48214

STEPHEN P. BERZON
FRED H. ALTSHULER
177 Post Street
San Francisco, California 94108
Attorneys for UAW

(Appendix Follows)

APPENDIX

Appendix

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., June 8, 1970.

HON. CARL D. PERKINS,
House of Representatives,
Washington, D.C.

DEAR COLLEAGUE: It is ironic and tragic that a bill designed to strengthen the law against discrimination in employment should be perverted and distorted into a vehicle which, although initially designated to increase and perpetuate discrimination on the basis of sex, actually will authorize discrimination on the basis of race, color, religion and national origin, as well as sex.

Yet that is exactly what would happen under the amendment which Congressman Marvin L. Esch sponsored, and which the General Labor Subcommittee included, in the bill recommended to the House Education and Labor Committee—H.R. 17555, the "Equal Employment Opportunities Enforcement Act," to revise Title VII of the Civil Rights Act of 1964.

The Esch amendment would permit any employer to discriminate between employees in connection with pension and retirement plans, "notwithstanding any other provisions" of Title VII, and thus to do so on the basis of "race, color, religion, sex, or national origin."

The effect of his amendment is so startling that it is hard to believe it. Yet that is precisely what the

Esch amendment says. It thus simply repeals Title VII so far as concerns pension and retirement plans.

This matter I call to your attention in the hope that you, as a member of the Education and Labor Committee, will vote against the Esch amendment when the Committee considers H.R. 17555, which I understand will be in the next few days.

Title VII of the 1964 Civil Rights Act was a great milestone in the national effort to eliminate irrational bias in employment. It makes it unlawful for any employer "to discriminate against any individual" on the basis of race, color, religion, sex or national origin with respect to "compensation, terms, conditions, or privileges of employment." The employee's option to retire at a certain age is clearly a "privilege" of employment, and the terms and benefits of a retirement plan are certainly derived from the employment relationship. Therefore, Title VII plainly prohibits discrimination with regard to pension and retirement plans on the basis of race, color, religion, sex, or national origin. Since the same language of Title VII applies to race discrimination as to sex discrimination, it is clear that both race and sex discrimination are not permissible with respect to pensions and retirement plans.

The Esch amendment stems from the fact that the Equal Employment Opportunity Commission, acting pursuant to the historic mandate of Title VII, issued Guidelines on sex discrimination in February 1968 (33 F.R. 3344; 29 C.F.R. 1604.31) stating that a "difference in optional or compulsory retirement ages based on sex violates Title VII." These Guidelines were issued after extensive consideration by EEOC for over two years, plus comprehensive public hearings held in May 1967. The Commission also said that it would later rule (but it is still studying) whether other sex differences in pension and retirement plans, such as differences in annuity computations, benefits to survivors, etc., are valid under the equality mandate of Title VII.

The Bell Telephone companies, the principal lobbyists for the Esch amendment, have persistently sought to obtain legislative repeal of the EEOC ruling. They seek the amendment in order to retain their present pension and retirement systems, which discriminate in different aspects, against not only their women employees but also their male employees. This is but another example of sex discrimination by the telephone companies which have long relegated women to the lesser paid jobs in the communication industry. Telephone companies are defendants in some of the most significant court suits by their women employees protesting employment discrimination based on sex. Both the courts and the EEOC have repeatedly ruled against the telephone companies in sex discrimination cases. For example, Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 (CA 5, 1969); Cheatwood v. South Central Bell Tel. & Tel. Co., 303 F. Supp. 754 (N.D. Ala. 1969); Tuten v. Southern Bell Tel. Co., 2 FEP Cases 299 (M.D. Fla. 1969).

The Esch amendment is copied from the language proposed by the Bell Telephone companies which would legislatively sanction many types of sex discrimination, including such matters as optional retirement age, the age and employment tenure required for participation in pension plans, survivorship benefits, computation of amount of the pension, the date and conditions under which rights to annuities become vested, and other aspects of pension and retirement plans. However, the Esch amendment inexplicably omits the words "male" and "female", perhaps in order to obfuscate and veil its effect, and thus broadens it from a vehicle of sex discrimination to one which permits discrimination on the basis of race, color, religion, and national origin, as well as sex.

It is inconceivable to me that the Congress would adopt a provision which would sanction race discrimination in pension and retirement plans. Indeed, I am astonished that the Esch amendment is drafted so broadly, since the Bell Telephone companies lobbyists for this amendment have heretofore explicitly requested legislation to permit such discrimination only on the basis of sex. But even if the Committee amends the Esch amendment to restrict it to sex discrimination, it would still be contrary to our national policy of nondiscrimination and should not be adopted.

For your convenience I have prepared the attached analysis detailing some of the specific defects of the Esch amendment, with particular emphasis on its sex discrimination features. I hope you will read it before

you vote on H.R. 17555, and that it will persuade you to vote against the amendment, in its entirety.

With warm regards.

Sincerely yours,

MARTHA W. GRIFFITHS,
Member of Congress.

ANALYSIS BY MARTHA W. GRIFFITHS CONCERNING THE ESCH AMENDMENT TO H.R. 17555 (91ST CONG.)—THE "EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT"—TO PERMIT RACIAL AND SEX DISCRIMINATION IN PENSION AND RETIREMENT PLANS

The amendment sponsored by Congressman Marvin L. Esch to H.R. 17555, now pending in the House Committee on Education and Labor, would add the following new subsection to section 703 of Title VII of the Civil Rights Act of 1964:

"(k) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice to observe a pension or retirement plan, the terms or conditions of which permit but do not require certain employees to retire at earlier ages than other employees, or provide for other reasonable differentiation between employees, provided that such pension or retirement plan is not merely a subterfuge to evade the purposes of this title."

Title VII prohibits discrimination concerning "compensation, terms, conditions, or privileges of employment" on the basis of "race, color, religion, sex, or

national origin." The Esch amendment permits discrimination "notwithstanding any other provision" of Title VII. Hence, the Esch amendment would permit discrimination, in pension and retirement plans, on the basis which Title VII prohibits, namely, race, color, religion, sex, or national origin.

Although the Esch amendment would apparently not sanction such discrimination in connection with compulsory retirement age, it would permit such discrimination in many other aspects of pension and retirement plans, including optional retirement age, the age required for participation in pension plans, survivorship benefits, computation of the amount of pension payments, the date and conditions under which rights to annuities become vested, and any other aspect which might be deemed a "reasonable differentiation between employees". However, the Esch amendment contains no definition as to what is a "reasonable differentiation" besides optional retirement age, and does not state any criteria by which to judge what discrimination is "reasonable". Hence, that phrase does not really limit the scope of the Esch amendment. Nor does the proviso that the pension plan should not be "merely a subterfuge to evade" Title VII provide any real protection against such discrimination. If the plan contains any element besides that which is a "subterfuge," the plan would then no longer be "merely" a subterfuge, even though it blatantly discriminates on a basis by Title VII. This is not an idle fear, in view of the recent decision by the U.S. Court of Appeals for the Fifth Circuit that sex discrimination in employment is permissible if it is associated with another element not prohibited by Title VII. *Phillips v. Martin Marietta Corp.*, 411 F. 2d 1; rehearing den., 416 F. 2d 1257 (C.A. 1969). The Supreme Court granted certiorari on March 2, 1970 (No. 1058, Oct. Term, 1969), and will hear, and I hope reverse, that decision next fall.

Sometimes I hear the argument made that sex distinctions in retirement ages are reasonable because of sex differences in actuarial mortality tables. Yes, women do live longer than men. When a man retires at 65, he will receive approximately 10 years of pension payments, while a woman who retires at 62 will receive approximately 20 years of such payments. If any sex is entitled to an earlier optional retirement age privilege, it should be the male. Frankly, no sex differential is reasonable for retirement age, and the Esch amendment would simply permit unwarranted discrimination based on sex.

There is no valid national need for the Esch amendment. Over 95 percent of all pension plans under collective bargaining reported pursuant to the Welfare and Pension Plans Disclosure Act contain no distinction between men and women workers. The other 5 percent contained sex differentials only as to the age required for participation in the pension plan or for retirement. (Incidentally, the pension plans of the Bell Telephone companies, the principal lobbyists for the Esch amendment, affect the most employees.) Furthermore, industry at present rarely makes sex the basis for differences in the pensions paid to the

retired employee, or in the amount of credited service and earnings necessary to receive such benefits. Yet the Esch amendment would sanction and encourage sex discrimination in all of these aspects, and others, of pension and retirement plans, "notwithstanding any provision of Title VII." In trust, the Esch amendment is so broad as to constitute virtually a blank check for sex discrimination in pension and retirement plans.

Neither the Federal Civil Service nor the Social Security retirement systems provide for different retirement ages as between men and women, whether for compulsory retirement or for optional retirement. Both systems are totally devoid of sex discrimination, except for two aspects. One aspect, which will be abolished by the Social Security Amendments of 1970 passed by the House on May 21, 1970 (H.R. 17550), concerns the difference in computing benefits for Social Security retirees under which men retiring between ages 62 and 65 receive lower pensions than women retiring at such ages. The other aspect concerns survivorship benefits, which are granted to a male employee's widow without requiring her to show that she was the employee's dependent, but are not granted to a female employee's widower unless he shows he was the employee's dependent. This distinction is based on a concept of welfare, rather than compensation for work performed, and I have introduced bills to end this distinction and to put widowers and widows on the same footing for survivorship benefits based on their spouse's employment. I believe

the dependency distinction between widows and widowers will eventually be abolished. In any event, it does not justify the broad and virtually unlimited sex discrimination which the Esch amendment would permit and encourage in all non-Federal pension and retirement plans.

Since the Federal Civil Service and Social Security retirement systems operate effectively without broad scale sex discrimination, I see no reason why non-Federal pension and retirement plans cannot also operate effectively without sex discrimination.

There may be some women who would want to take advantage of an earlier optional retirement age than is available to their male colleagues. But their concern must be balanced against the fact that the disadvantages of sex differentials in pension and retirement plans far outweigh that particular benefit. Permitting sex discrimination in relation to optional retirement will foster the continuation of discrimination now practiced against women who are able and desire to work beyond the optional retirement age. Experience has shown that where such earlier option exists, many employers deny promotion to qualified women on the ground that they may be retiring at an earlier age. In addition, many employers also exert pressure on women to retire at the earlier age in order to replace them with younger women or men. The earlier optional retirement age privilege is not an unalloyed benefit to women. Finally, with respect to the small group of women who are now near retirement age and who might have planned to retire under the op-

tional privilege, it should be noted that the Equal Employment Opportunity Comission announced, on September 16, 1968, that it would construe the Guidelines on sex discrimination as permitting women workers, who were then within 10 years of retirement age under existing retirement plans permitting optional retirement, to retain their right to exercise that option. That E.E.O.C. ruling certainly destroys any possible argument that the equality mandate of Title VII is unfair to any women having a sex discriminatory preference under an existing retirement plan.

We should also consider the source of the argument that sex differentials in optional retirement ages favor women and, therefore, should not be abandoned. That argument is not supported by the almost 200,000 member National Federation of Business and Professional Women's Clubs, a traditional protector of the rights of the working woman, or by the Citizen's Advisory Council on the Status of Women, or by the National Organization for Women whose goal is "full equality for women in truly equal partnership with men," or by the National Woman's Party which has fought for women's rights since the early 1900's. On the contrary, the principal lobbyists for the Esch amendment are the Bell Telephone companies who have long relegated women to the lesser paid jobs in the communications industry, and who fear that the elimination of sex differences in retirement age may result in earlier retirement for men, or longer service and increased credits for women, and thereby increase the companies' pension costs. I don't know why the

Bell Telephone companies are worried about this, since the hearings before the Joint Economic Committee's Subcommittee on Fiscal Policy, of which I am chairman, revealed that in 1966 those companies had over $5 billion in their pension trust funds and had never paid out one cent of the principal—all pensions are paid entirely from the interest earned by the trust funds. Hearings on Private Pension Plans, 89th Congress, Part One (May 2, 1966), pp. 228, 235.

Furthermore, I find it difficult to understand the reasoning that a system which discriminates in some ways against men rather than against women should, therefore, be continued. We in the Congress are elected by all the people, men and women, and it ill behooves us to discriminate against either men or women solely on the basis of sex. Indeed, I resent the implication that women should be favored over men on the assumption that women are incapable of withstanding unprotected the rigors of economic life and hence must be especially protected and favored by the law. Whatever validity that concept had five or six decades ago, it has none today. According to the 1969 Handbook on Women Workers published by the Department of Labor (Women's Bureau Bulletin 294), women head 11 percent of all families (page 28), and comprise 37 percent of our total labor force 16 years of age and over (pages 9, 10, 22). Women are now certainly entitled to be rid of the "adult children" myth which brands them as incapable of equal participation in our present economy. They are willing to

take their chances with equal privileges if society will but grant them equal opportunities.

Moreover, while the direct effect of an earlier retirement age for women primarily discriminates against men, its indirect effect also discriminates against women,—namely, the wives nad families of male employees who are denied retirement age privileges available to female employees. Discrimination is a seamless web. If we permit it to exist against the interests of one group, it will inevitably work against the interest of the other.

The Esch amendment has no place in a country dedicated to the proposition of equality of opportunity regardless of race, color, religion, sex, or national origin. It should be roundly rejected.

Thank you for permitting me to express my views on Section 805 of your bill, H.R. 16098. I fully suport that section and will work with you to obtain its enactment.

FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER ET AL.,

Petitioners,

v.

MARIE MANHART ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ASSOCIATION FOR WOMEN IN MATHEMATICS AND THE WOMEN'S EQUITY ACTION LEAGUE AS AMICI CURIAE

MARGUERITE RAWALT,
1600 S. Joyce,
Arlington, Va.,
CAROLYN I. POLOWY,
226 East 39th Street,
Baltimore, Md. 21218,
MARGARET YOUNG,
1501 Broadway,
New York, N.Y. 10036,
Attorneys for the Association For Women In Mathematics and The Women's Equity Action League.

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

PAGE

INTEREST OF *Amici Curiae* 1

ARGUMENT:

A Prima Facie Violation of Title VII Is Established Where All Female Employees Must Pay Extra Contributions To An Employment Based Pension Plan In Order To Receive The Same Benefits As Similarly Situated Male Employees 3

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Bartmess v. Drewery's U.S.A., Inc., 444 F.2d 1186 (7th Cir.), cert. denied, 404 U.S. 936 (1971) . 5

Chastang v. Flynn & Emrich Co., 541 F.2d 1040, (4th Cir. 1976) 5

Cleveland Board of Educators v. LaFleur, 414 U.S. 632 (1974) 11

E.E.O.C. v. Colby, ___ F, Supp. ___ (D. Me. 1977) 6

Fillinger v. East Ohio Gas Co., 4 FEP Cases 73 (N.D. Ohio 1971) 5

Fitzpatrick v. Bitzer, 390 F. Supp. 278 (D. Conn. 1974), 519 F.2d 559 (2d Cir.), modified on other grounds, 424 U.S. 445 (1976) 5

Frontiero v. Richardson, 411 U.S. 677 (1973) 11

General Electric v. Gilbert, 429 U.S. 125 (1976) 3, 4, 6, 11

Henderson v. State of Oregon, 405 F. Supp. 1271 (D. Ore. 1975) 5

PAGE

Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3rd Cir. 1973) 5

Turner v. Dept. of Employment Security, 423 U.S. 44 (1976) 11

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) .. 11

U.S. Constitution:

Fifth Amendment 11

Fourteenth Amendment 11

Statutes

Title VII of the 1964 Civil Rights Act, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-2 *et seq.*, (1970) .....*passim*

Title VII of the 1964 Civil Rights Act, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-2(a)(1) *et seq.*, (1970) 4

Title VII of the 1964 Civil Rights Act, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-2(a)(2) *et seq.*, (1970) 4

Other

American Council of Life Insurance, *Pension Facts 1976* 6, 7

Bergman and Gray, "Equality in Retirement Benefits," *Civil Rights Digest*, 25-27 (Fall 1975) 9

Bernstein and Williams, "Title VII and the Problems of Sex Classifications in Pension Programs," 74 *Colum. L. Rev.* 1203 (1974) . 10

PAGE

Comment, "Gender Classifications in the Insurance Industry," 75 *Columbia Rev.* 1381 (1975) 10

Fellers, *et. al., Handbook for Pension Planning* (1949) 7, 8

Fellers and Jackson, *Non-Insured Pension Mortality: the UP-1984 Table* (May 1975) 6, 7, 9

Martin, "Gender Discrimination In Pension Plans: Comment," *Journal of Risk and Insurance* 141 (1977) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER ET AL.,

Petitioners,

v.

MARIE MANHART ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ASSOCIATION FOR WOMEN IN MATHEMATICS AND THE WOMEN'S EQUITY ACTION LEAGUE AS AMICI CURIAE

INTEREST OF AMICI CURIAE[1]

The Association for Women in Mathematics is a non-profit corporation formed in 1971 to encourage greater participation of women in mathematics by psychological reinforcement, by bringing women mathematicians together and by working wherever possible to encourage and implement the principles of affirmative action among men and women mathematicians. The Association's membership is international and includes female

[1] The parties' letters of consent to the filing of this brief have been filed with the clerk pursuant to Rule 42(2).

and male mathematicians, statisticians, engineers, accountants and other professionals. A large proportion of the membership is engaged in teaching and research at American colleges and universities. The Association has been actively seeking to modify employment based pension plans which differentiate on the basis of sex in the payment of benefits or in the standards for determining contributions.

The Women's Equity Action League (WEAL) is a non-profit nationwide membership organization incorporated under the laws of Ohio with national offices in the District of Columbia. Established in 1968, WEAL seeks to promote greater economic progress for American women, to press for full enforcement of anti-discrimination laws on behalf of women and to seek correction of *de facto* sex discrimination. WEAL has placed primary emphasis on the elimination of sex-discrimination in employment and education and has pursued its goals through litigation, monitoring the enforcement activities of federal and state agencies and through research and publication of pertinent information and data. One of the employment practices which WEAL has challenged is the differentiation between men and women in employment based pension plans. By filing charges with the Equal Employment Opportunity Commission on behalf of members, WEAL has specifically attacked the practice of higher education institutions providing pension plans which pay lower periodic pension benefits to women than they pay to male employees. The practice challenged here is one aspect of the larger problem of pension and employment discrimination which WEAL seeks to eliminate.

It is the intention of amici to discuss the component parts and structure of pension plans within the framework of Title VII. While it is conceded that the single issue presented in this case concerning differentiation by sex in pension contributions can be decided

without addressing the larger question of whether Title VII prohibits the use of sex-based actuarial tables in the pension industry for the computation of costs or benefits, discussion of the broader questions has been initiated throughout this litigation and is of considerable concern to persons affected by the sex based contribution and benefit differentials which exist under certain pension plans, in particular those operated by public employers and higher education institutions.

ARGUMENT

A PRIMA FACIE VIOLATION OF TITLE VII IS ESTABLISHED WHERE ALL FEMALE EMPLOYEES MUST PAY EXTRA CONTRIBUTIONS TO AN EMPLOYMENT BASED PENSION PLAN IN ORDER TO RECEIVE THE SAME BENEFITS AS SIMILARLY SITUATED MALE EMPLOYEES.

Resolution of the principal discrimination issue in this case rests on whether Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. 2000e-2, *et seq.*, permits an employer to provide a retirement plan as a fringe benefit which requires all female employees to pay higher monthly contributions in order to receive the same periodic benefits as male employees who have worked the same number of years at the same salary and retired at the same age. Drawing analytical support from *General Electric v. Gilbert,* 429 U.S. 125 (1976), the pension issue raised by the practice of the Employer, the City of Los Angeles Department of Water and Power, has been characterized by its proponents as one dealing with a differentiation based on longevity rather than sex in order to remove the challenged practice from the ambit of scrutiny under Title VII.

In the operation of the City of Los Angeles, Department of Water and Power retirement plan, referred to hereafter as the Department's plan or the pension plan, regardless of other reliable predictors of longevity, male employees are placed in a single category based on their

sex for the purpose of determining their contributions to the pension plan. All female employees, without regard to predictable estimates for individual longevity, are treated as the longer-lived of the two groups based solely on their sex. This subdivision of the employee population is obviously not one based on longevity. If it were, all persons, male *and* female, who have certain characteristics and lifestyles which contribute to longevity would be placed in a common class of predictably long or short lived persons. Since all men, regardless of their prospects for old age are treated as if they will die younger than similarly situated females, and all women, regardless of indications of probable early death, are placed in a single category, unlike the subclassification of pregnant women discussed in *General Electric v. Gilbert, supra,* the classifications used in the Department's plan to determine costs and pension contributions separate men and women into separate sex based classes without any other distinction.

As a general proposition, Title VII of the 1964 Civil Rights Act, as amended, prohibits covered employers from treating male and female employees differently based on their sex. Under Section 703(a)(1), (42 U.S.C. 2000e-2(a)(1)), an employer shall not "fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's . . . sex . . ." Under Section 703(a)(2), (42 U.S.C. 2000e-2(a)(2)), an Employer may not "limit, segregate or classify" employees because of their sex. The plain language and interpretations of Title VII support a conclusion that male and female employees may not be treated, for the purpose of employment benefits, including employment based pensions, as separate classes of employees because of their sex. The danger of disadvantaging one group

which is inherent in sex based treatment of employees is precisely the harm which Title VII aims at eliminating.

The lower courts have uniformly held that Title VII applies to pension plans as terms or conditions of employment and, with one exception, have also concluded that the Act prohibits different treatment of men and women in the amount of benefits paid or in the terms established for a pension plan. See *Chastang v. Flynn & Emerich Co.,* 541 F.2d 1040 (4th Cir. 1976), where the Employer's pension plan violated Title VII because individual male employees who retired early received approximately half the benefits that comparable female early retirees received; *Fitzpatrick v. Bitzer,* 390 F. Supp. 278 (D. Conn. 1974), 519 F.2d 559 (2d Cir.), modified on other grounds, 424 U.S. 445 (1976), where the Employer's plan violated Title VII because it discriminated in favor of women over men in the number of years of service required for retirement and in the computation of retirement benefits; *Rosen v. Public Service Electric & Gas Co.,* 477 F.2d 90 (3rd Cir. 1973), where Title VII was violated because stricter requirements were applied to male employees in regard to age and benefit amounts for early retirement and female employees were discriminated against in regard to mandatory retirement age; *Bartmess v. Drewery's U.S.A., Inc.,* 444 F.2d 1186 (7th Cir.), cert. denied, 404 U.S. 936 (1971), where an employment based pension plan which established a lower mandatory retirement age for women was held to violate Title VII's sex discrimination prohibition; *Fillinger v. East Ohio Gas Co.,* 4 FEP Cases 73 (N.D. Ohio 1971), where an employment based pension plan which required women employees to retire at age 62 and males at age 65 was found to violate Title VII; *Henderson v. State of Oregon,* 405 F. Supp. 1271 (D.Ore. 1975), where an employer plan which paid lower benefits to all female

employees was held to violate Title VII; cf., *E.E.O.C. v. Colby College,* ____ F. Supp. ____ (D.Me. 1977), where the court applied the language of Title VII as interpreted in *General Electric v. Gilbert, supra,* to permit an employment based pension plan which paid lower benefits to all female employees and a life insurance plan which paid lower benefits to all male employees.

In order to lay to rest the question of whether or not a *prima facie* case of sex discrimination is established under Title VII where all females must pay extra contributions in order to receive the same pension benefits as comparable males, it is necessary to examine the proposition of "actuarial equivalence" since monetary values which are not equal in fact may be described as actuarially equal or theoretically equivalent. The phrase "actuarially equivalent" has been defined to mean that if "the present values of two series of payments are equal, taking into account a given interest rate and mortality according to a given table, the two series are said to be actuarially equivalent on this basis." American Council of Life Insurance, *Pension Facts,* 1976, p. 44. The two key variables used in determining the actuarial equivalence of two sums are the interest rates paid on the invested funds and the mortality tables utilized in estimating costs and/or potential benefits. Thus, a male and female employee who are similar in all other relevant respects will have actuarially equivalent pensions if the same mortality table is used to compute costs and benefits, and if the interest earned by the fund is the same. To illustrate the impact of an increase in interest earnings on a pension fund, one expert has stated that "a change from one mortality basis to another is generally of lesser importance than a ¼% change in the valuation rate of interest." Fellers and Jackson, *Non-Insured Pension Mortality: The UP-1984 Table,* (1975), p. 30. The importance of interest earnings on pension plans

established by public employers has been described in another way:

> In the past, investments by state and local plans tended to be more conservative than private plans. In recent times, however, their portfolios have become more diverse, including a higher percentage of common stock, in order to increase investment income. According to actuarial estimates, in a mature, reasonably well-funded plan, a one percent annual increase in investment earnings, produced from asset appreciation, realized gains or interest, can produce a ten percent decrease in annual cost. American Council of Life Insurance, *Pension Facts 1976,* p. 33.

Actuarial equivalency is also affected by the mortality table which is chosen by an actuary to assist in estimating costs by predicting the number of person years a fund must cover. Constructed to estimate probable numbers of deaths at various ages, a mortality table may be, and frequently is, modified to reflect changes in group experience. Fellers, *et al., Handbook for Pension Planning* (1949), pp. 153-156. It is noteworthy that the so-called "single sex" tables which are most frequently used by pension funds are, for the most part, mortality tables constructed from male experience only:

> As a practical matter different mortality tables are rarely used for males and females. What has been done more frequently in practice is to use an age setback in the male table as an approximation of female mortality. . . . The mortality table that is eventually used for valuing females usually has been based on all-male mortality experience and does not reflect any of the significant characteristics of the female mortality experience. Fellers and Jackson, *supra,* p. 4.

Mortality tables are useful as tools in estimating the total costs or liability of a pension plan which, in turn, helps to define the contribution rates necessary to fund a certain benefit level. Mortality tables are not, however,

the only factors used by actuaries to estimate the costs of funding a pension plan. Interest earned on investments, as indicated earlier, is another important variable. Other considerations include capital appreciation and depreciation, the rate of employee turnover, salary scales and projected salary increases, method of plan administration, retirement age, benefit levels, vesting provisions and level of employee contributions. Fellers, *supra,* pp. 150-166. The flexibility in estimating costs provided by these considerations is demonstrated by the following statement concerning the impact which an increase in retirement age will have on reduction in costs:

> . . . [A]ssume for the moment that normal retirement will not take place at age 65 as assumed, and we want to know the effect on costs if retirements (including early retirements) take place, on the average, at age 66 or at age 67. On this basis one might count on the long-range costs being reduced by possibly seven percent if retirements take place at age 66, on the average, or by 15 percent if retirements take place at age 67, if we can assume that there will be no very substantial mortality improvement among people over age 65. Fellers, *supra,* at 166.

Besides being only one among many factors considered by actuaries in pricing the cost of pension benefits, mortality tables can be restructured by actuaries to reflect changing social attitudes or legal requirements as they are periodically restructured to reflect increases in longevity. Just as race is no longer considered in establishing mortality tables, sex should not be either:

> Federal Government pressure via the E.E.O.C. for treating males and females in exactly the same way recalls to mind the fact that the government took a similar position some decades ago with respect to race and imposed a requirement that insurance companies charge exactly the same

> premiums for the same coverage irrespective of race, in spite of the fact that all of the published mortality experience then available, including the mortality statistics published with every decennial census indicated clearly that there were very significant differences in mortality rates and trends by race. Fellers and Jackson, *supra,* p. 3.

Unlike pregnancy which affects a subclass of females, death is egalitarian in its reach. What sex-divided mortality tables obscure is the significant overlap that in fact exists in male and female death ages. A comparison of death overlap between men and women illustrates the similarity between them — a similarity in death ages that far outweighs the differences. Eighty-four percent of men and women who live beyond age 65 share common death ages. Out of a group of 1000, if each woman who dies at a particular age is paired with a man who dies at the same age, eighty-four percent of the population will have been paired. The remaining 16 percent are women who live longer, unmatched by men, and men who die earlier, unmatched by women. Bergmann and Gray, "Equality in Retirement Benefits," *Civil Rights Digest,* Fall (1975), pp. 25-27.

It would be more in keeping with the insurance principle of sharing risks over a large group to treat retirees in a particular plan as "persons" and thus spread the costs of the longer-lived and the savings of the shorter-lived, which are not exclusive to either sex, over the entire pension plan population. Some men do live longer than the average life expectancy for their own sex and longer than the average female life expectancy. A retired male annuitant who outlives the statistically or actuarially "average" male or female is not thereafter punished for his longevity by a reduction in monthly pension benefits. A female, though, is penalized from the outset of her employment with the Los Angeles Department of Water and Power for her

presumed longevity, whether or not it is likely that she will actually outlive the "average" male or the "average" female. Where sex separate tables are used to determine contributions or benefits, every retired female employee is penalized because a few women live longer and every man benefits because a few men die earlier.

It is apparent that in comparing death ages for men and women a significant similarity is demonstrated which could be the basis for merging sex based mortality tables. Thus, just as an entire employee complement now shares the risks and benefits of individual involvement in aviation, military service or dangerous sports, the use of tobacco, drugs or alcohol, or even a poor medical history, a sex neutral mortality table would spread the risks and benefits of sex characteristics over the entire annuitant population. See, Bernstein and Williams, Title VII and the Problem of Sex Classifications in Pension Programs, 74 *Colum. L. Rev.* 1203, 1220 (1974); Comment, "Gender Classifications In the Insurance Industry," 75 *Colum. L. Rev.* 1381, 1381 (1975).

The use of sex differentiated mortality tables to determine pension costs and contributions establishes what in effect is a conclusive presumption that all women, regardless of any other relevant considerations, will live longer than all similarly situated men. In the face of a significant overlap in death ages between men and women, this presumption is sharply rebutted. While it may be actuarially convenient for pension trusts and insurance companies to divide humanity into two sex-based subclasses that empirically or statistically conform to established models, such sex-based treatment should not be permitted where factors other than sex may be used to predict longevity and to determine contributions and benefits. Administrative ease has been rejected as a defense to sex based conclusive presumptions in cases decided under the

Fifth and Fourteenth Amendments. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974); *Frontiero v. Richardson,* 411 U.S. 677 (1973), *Turner v. Department of Employment Security,* 423 U.S. 44 (1976); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975). To the extent that these cases define activity as prohibited sex-discrimination under the Fifth or Fourteenth Amendment, they are a "useful starting point" in interpreting Title VII's sex discrimination prohibition in the area of pension benefits. *General Electric v. Gilbert, supra,* at 133.

Under Title VII, employment decisions and practices are to be sex neutral and sex based differentiations cannot be justified by sex based statistics, beliefs or formulas. Thus, an employer could not decide to pay women lower salaries than comparable male employees because the employer knows for a fact, supported by statistics, that women as a class earn lower salaries than men or because the employer believes that women need less money than men. Thus, if an employer could demonstrate through the use of a sophisticated formula that his female employees as a class receive more wages than his male employees and that the male and female wages were actuarially equivalent, would it be permissible under Title VII for the employer to pay individual females lower wages based on this formula? One expert phrases the issue in regard to mortality tables another way.

> For any person, the variables race and sex are static, while age is a dynamic variable increasing at the same rate for everyone. The values of the race/sex variables for any individual are known from birth, but everyone is "assigned" an age variance with a value that is unknown until death. [May an actuary] . . . ignore all static variables except sex and still claim that the use of sex alone is not arbitrary and discriminatory? Martin, Gender Discrimination In Pension Plans: Comment, *Journal of Risk and Insurance,* 145, 148 (1977).

There are no valid reasons related to the functioning of the Department of Water and Power, or to the fundamental purpose of retirement plans or the financial needs of male and female retirees which would justify or require sex-based distinctions in contribution formulas. All other benefits and risks attributed to subclasses of employees are shared over the entire employer population. The burden placed on female employees of subsidizing all longer-lived retirees should be equally borne by male and female employees since both are potential recipients of long-term benefits and some members of each sex will in fact live beyond the statistical models established by the insurance and pension industry. Requiring women as a class to pay more to receive the same pension benefits as comparable males is *prima facie* sex discrimination under Title VII that cannot be justified based on a discriminatory sex-based formula even if that formula is actuarially acceptable. Both the practice of unequal contributions and the causative factors, the single-sex mortality tables, should be prohibited in employment based pension plans under Title VII.*

* The substantial contributions of Professor Mary W. Gray in the preparation of this brief are grateful acknowledged.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

MARGUERITE RAWALT,
1600 S. Joyce,
Arlington, Va.,
CAROLYN I. POLOWY,
226 East 39th Street,
Baltimore, Md. 21218,
MARGARET YOUNG,
1501 Broadway,
New York, N.Y. 10036,
Attorneys for the Association For Women In Mathematics and The Women's Equity Action League.

FOR ARGUMENT

No. 76-1810

Supreme Court, U. S.
FILED
DEC 30 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, ET AL., PETITIONERS

v.

MARIE MANHART, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

WADE H. McCREE, Jr.,
Solicitor General,
DREW S. DAYS, III,
Assistant Attorney General,
LAWRENCE G. WALLACE,
Deputy Solicitor General,
THOMAS S. MARTIN,
Assistant to the Solicitor General,
BRIAN K. LANDSBERG,
CYNTHIA L. ATTWOOD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ABNER W. SIBAL,
General Counsel,
JOSEPH T. EDDINS,
Associate General Counsel,
BEATRICE ROSENBERG,
Assistant General Counsel,
MARY-HELEN MAUTNER,
Attorney,
Equal Employment Opportunity Commission,
Washington, D.C. 20506.

INDEX

	Page
Question presented	1
Interest of the United States and the Equal Employment Opportunity Commission	1
Statement	2
Summary of Argument	6
Argument:	
I. A policy of deducting greater amounts from the wages of female employees than from those of male employees in return for a contingent future right to an equal monthly retirement allowance violates Title VII	13
A. Petitioners' policy constituted discrimination based upon sex	13
B. Petitioners have suggested no adequate basis for an affirmative defense under Title VII	20
II. A requirement that female employees contribute more to a pension plan than similarly situated male employees violates the equal pay act	32
Conclusion	45

CITATIONS

Cases:	
Bartmess v. *Drewrys U.S.A. Inc.*, 444 F. 2d 1186, certiorari denied, 404 U.S. 939	15
Bowe v. *Colgate-Palmolive Company*, 416 F. 2d 711	14
Brennan v. *Heard*, 491 F. 2d 1	36
Brennan v. *Veterans Cleaning Service, Inc.*, 482 F. 2d 1362	35, 36
Brooklyn Bank v. *O'Neil*, 324 U.S. 697	36
Califano v. *Goldfarb*, 430 U.S. 199	33
Chastang v. *Flynn & Emrich Co.*, 451 F. 2d 1040	7, 15
Craig v. *Boren*, 429 U.S. 190	22
Diaz v. *Pan American World Airways, Inc.*, 442 F. 2d 385, certiorari denied, 404 U.S. 950	15

252-002—77——1

Cases—Continued Page
Dothard v. *Rawlinson*, No. 76-422, decided June 27, 1977 ---------- 7, 14, 21, 22
Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86---------- 32
Fitzpatrick v. *Bitzer*, 390 F. Supp. 278, reversed on other grounds, 427 U.S. 445---------- 15
General Electric Co. v. *Gilbert*, 429 U.S. 125_ 5, 6, 10, 19, 20, 32
Griggs v. *Duke Power Co.*, 401 U.S. 424---------- 21
Henderson v. *State of Oregon*, 405 F. Supp. 1271, appeal docketed (C.A. 9, No. 76-1706, March 30, 1976) ---------- 17
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324---------- 33
Nashville Gas Co. v. *Satty*, No. 75-536, decided December 6, 1977---------- 19, 20
National Labor Relations Board v. *Seven-up Bottling Co.*, 344 U. S. 344---------- 32
National Labor Relations Board v. *Weingarten, Inc.*, 420 U.S. 251---------- 32
Reilly v. *Robertson*, 360 N.E. 2d 171, certiorari denied, No. 76-1635, October 3, 1977---------- 17
Rigopoulos v. *Kervan*, 140 F. 2d 506---------- 36
Robinson v. *Lorillard Corp.*, 444 F. 2d 791, certiorari dismissed, 404 U.S. 1006---------- 8, 21
Roland Electrical Co. v. *Black*, 163 F. 2d 417, certiorari denied, 333 U.S. 854---------- 36
Rosen v. *Public Service Electric and Gas Co.*, 477 F. 2d 90 ---------- 7, 15
Rosenfeld v. *Southern Pacific Company*, 444 F. 2d 1219 ---------- 14
Shultz v. *American Can Company Dixie Products*, 424 F. 2d 356---------- 35
Shultz v. *Hinojosa*, 432 F. 2d 259---------- 36
Shultz, v. *Wheaton Glass Company*, 421 F. 2d 259--- 35
Sprogis v. *United Air Lines, Inc.*, 444 F. 2d 1194------ 14
Wirtz v. *Midwest Mfg. Corp.*, 58 CCH Lab Cas. 32,070 18 WH Cases 556 (S.D. Ill., decided August 9, 1968) ---------- 11, 43-44
Constitution, statutes and regulations:
United States Constitution, Fourteenth Amendment-- 3

Statutes and regulations—Continued Page
California Constitution, Article 1:
Section 1---------- 3
Section 21---------- 3
Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. 1983-- 3
Civil Rights Act of 1964:
Title VII, 78 Stat. 253, as amended, 42 U.S.C. (and Supp. V) 2000e *et seq*---------- 2-3
Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1)----- 7, 13
Section 703(a)(2), 42 U.S.C. (Supp. V) 200e-2 (a)(2) ---------- 14
Section 703(h), 42 U.S.C. 2000e-(h)---------- 10, 32
Section 706, 42 U.S.C. (Supp. V) 2000e-5(f)(1)-- 2
Section 707, 42 U.S.C. (and Supp. V) 2000e-6---- 2
Section 717, 42 U.S.C. (Supp. V) 2000e-16------ 2
Equal Pay Act, 77 Stat. 56:
Section 2(a)---------- 35
29 U.S.C. 206(d)---------- 2, 35
29 U.S.C. 206(d)(1)---------- 33-34, 36, 44
Fair Labor Standards Act of 1938, 52 Stat. 1060), as amended,
29 U.S.C. 201 *et seq.*:
Section 2(a), 29 U.S.C. 202(a)---------- 35
Section 6, 29 U.S.C. 206---------- 35
29 U.S.C. (Supp. V) 1054(c)(2)---------- 38
California Government Code § 7500 (West, 1977 Cum. Supp.) ---------- 4
29 C.F.R. 1604.9(e)---------- 32
29 C.F.R. 1604.9(b)(f)---------- 31
29 C.F.R. Part 2610---------- 38
29 C.F.R. 2609.4---------- 38
29 C.F.R. 800.142-800.148---------- 39
29 C.F.R. 800.116(d)---------- 12, 41-42
29 C.F.R. 800.151---------- 11, 12, 42-43
Miscellaneous:
Bergmann and Gray, "Equality in Retirement Benefits" *Civil Rights Digest* (Fall 1975)---------- 18
Bernstein, *The Future of Private Pensions* (1964)---- 22-23
BNA Wage-Hour Manual 95:607---------- 11, 44
109 Cong. Rec. 8916 (1963)---------- 35
109 Cong. Rec. 9203 (1963)---------- 37

Miscellaneous—Continued

	Page
109 Cong. Rec. 9205–9206 (1963)	39
110 Cong. Rec. 13663, 13664 (1964)	32
Enstrom, "Cancer Mortality Among Mormons", 36 *Cancer* 825 (1975)	16
Fauman and Mayer "Jewish Mortality in the United State," Shiloh and Selavan, *Ethnic Groups of America: Their Morbidity, Mortality and Behavior Disorders, Vol. I*—The Jews (1973)	16
30 Fed. Reg. 14926–14928	31
33 Fed. Reg. 3344	31
35 Fed. Reg. 18692	31
37 Fed. Reg. 6835–6837	31
41 Fed. Reg. 6194, 6195	38
41 Fed. Reg. 48484, 48489	38
Fellers and Jackson, "Noinsured Pensioner Mortality: The UP–1984 Table," 25 *Proceedings, Conference of Actuarities in Public Practice* (1976)	24, 26, 27, 28
Greenless and Keh, "The 1971 Group Annuity Mortality Table," 23 *Transactions, Society of Actuaries* (1972)	5
H.R. Rep. No. 309, 88th Cong. 1st Sess. (1963)	11, 38
H.R. 6060, 88th Cong., 1st Sess. (1963)	37
James, *The Metropolitan Life: A Study in Business Growth* (1976)	24
Kaladrubetz and Landay, "Coverage and Vesting of Full-Time Employees Under Private Retirement Plans, *Social Security Bulletin* (November 1973)	23
Kolodrubetz, "Private Retirement Benefits and Relationship to Earnings: Survey of New Beneficiaries," *Social Security Bulletin* (May 1973)	23
Lemon and Kuzma, "A Bilogic Cost of Smoking," 18 Archives of Environmental Health, American Medical Association (1969)	16
Secretary of Labor's Interpretative Bulletin on Equal Pay Act:	
Section 800.116(d)	12, 41–42
Section 800.151	12, 42–43
Shepherd and Webster, *Selection of Risks* (1957)	25
S. 1409, 88th Cong., 1st Sess. (1963)	37

Miscellaneous—Continued

	Page
S. Rep. No. 176, 88th Cong., 1st Sess. (1963)	37
S. Rep. No. 92–415, 92d Cong., 1st Sess. (1971)	32, 39, 40–41
Sutton, "Assessing Mortality and Morbidity, Disadvantages of the Black Population of the United States," Shiloh and Selavan, *Ethnic Groups of America: Their Morbidity, Mortality and Behavior Disorders*, Vol. II—The Blacks (1974)	16
United States Department of Health, Education, and Welfare, Public Health Service, Publication No. CDC 75–7511 (revised 1972), *Chart Book on Smoking, Tobacco and Health*	26

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, ET AL., PETITIONERS

v.

MARIE MANHART, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTION PRESENTED

Whether an employer's policy of deducting greater amounts from the wages of its female employees than its male employees in return for the contingent future right to an equal monthly retirement allowance constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Congress has assigned to the Equal Employment Opportunity Commission, the Department of Justice, and

the Civil Service Commission the responsibility for federal enforcement of Title VII of the Civil Rights Act of 1964. The Equal Employment Opportunity Commission may bring civil actions against private employers under 42 U.S.C. (Supp. V) 2000e–5(f)(1). The Attorney General has enforcement responsibility when the employer is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e–6. The Civil Service Commission exerts oversight responsibility to insure nondiscrimination in federal employment and serves as the administrative reviewing authority for Title VII charges filed by individual employees against federal agencies. 42 U.S.C. (Supp. V) 2000e–16. Federal enforcement of the Equal Pay Act is assigned to the Secretary of Labor. 29 U.S.C. 206(d).

STATEMENT

This suit was filed as a class action on behalf of female employees and retirees of the City of Los Angeles, Department of Water and Power ("the Department") [1] alleging that the Department's Employees' Retirement, Disability, and Death Benefit Insurance Plan [hereinafter "the Plan"] discriminated against women in violation of Title VII of the Civil

[1] In addition to the Department of Water and Power, respondents sued the Members of the Board of Commissioners of the Department, the Members of the Board of Administration of the Department's Employees' Retirement, Disability and Death Benefit Insurance Plan, the Department's chief accounting officer, and the Department's general manager (Pet. App. C–2).

Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (and Supp. V) 2000e *et seq.*[2]

The Department's plan covers most of its approximately 12,000 employees, of whom approximately 2,000 are women (Pet. App. B–9; A. 15). Participation by all eligible employees is compulsory (Pet. App. C–2). The plan is entirely funded by monthly contributions from the employees, supplemental contributions from the Department, and earnings on those contributions. No commercial insurance company is involved in the administration of the plan.

Under the plan a male and female employee of the same age, length of service, and salary, receive an identical monthly allowance upon retirement (Pet. App. B–10).[3] However, in return for these contingent equal monthly benefits, the female employee was required until December 31, 1974, to make contributions to the plan which were 14.84 percent greater than those of an equivalent male employee (Pet. App. C–2). For example, employee Joan E. Roberts contributed a total (including earnings) of $18,670.59 to the Plan (R. 176). A similarly situated male employee would have

[2] Plaintiffs also alleged violations of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. 1983, the Fourteenth Amendment to the Constitution, and Article 1, Sections 1 and 21 of the Constitution of the State of California.

[3] Although the Department's plan does not appear in the record, such pension plans universally make the vesting of a pension contingent upon a number of factors including a minimum term of service. For statistics indicating the impact of such contingencies on the probability that males and females will obtain vested pension rights, see note 18, *infra*.

252-902—77——2

contributed $13,274.55 (*ibid.*). The stated justification for requiring substantially differing contributions based upon the sex of the employee was that "[s]ound actuarial practice requires that annuity or pension plans be based on averaging of life expectancies of persons in ascertained classes (usually age and sex) since the life expectancy of a specific person cannot be predetermined" (A. 83).

Prior to the district court's decision the Department discontinued its use of higher contribution rates for female employees pursuant to California Government Code § 7500 (West, 1977 Cum. Supp.), which made it unlawful after January 1, 1975, for certain municipal agencies to require differing employee contributions based upon sex. The current retirement plan operates with equal monthly employee contributions and equal monthly benefits for similarly situated male and female employees (A. 102).

Respondents continued the litigation seeking restitution of the excess contributions made by female employees over the course of the preceding 2½ years, and successfully moved for summary judgment in the district court which held that basing employee contribution rates upon sex alone violates Title VII. The district court enjoined the Department from charging women a higher contribution rate, and awarded a refund to the women of all excess contributions between April 5, 1972, and December 31, 1974 (A. 134–135). The court of appeals affirmed (Pet. App. C), holding that the sex-based contribution schedule requiring increased payments by individual females, based upon the longevity of females as a group,[4] "is just the kind of abstract generalization, applied to individual women because of their being women, which Title VII was designed to abolish" (Pet. App. C–7). The court of appeals also held that a classification based explicitly and exclusively on sex[5] was not necessary to provide a financially sound pension plan, and noted that "distinctions based on many other longevity factors (*e.g.*, smoking and drinking habits, normality of weight, prior medical history, family longevity history) are not used [by the employer] in determining contribution levels" (Pet. App. C–11 to C–12).

Subsequently, the court of appeals, with one judge dissenting,[6] denied the Department's petition for rehearing (Pet. App. D), finding that unlike the exclusion of pregnancy from disability benefits (see *General Electric Co.* v. *Gilbert*, 429 U.S. 125) the differ-

[4] Calculations based upon Greenlee and Keh, "The 1971 Group Annuity Mortality Table," 23 *Transactions, Society of Actuaries*, Pt. 1, pp. 585–596 (1972), for example, show that women at age 65 on average will live 4.1 years longer than men at age 65.

[5] "[I]t does not seem reasonable to us to say that an actuarial distinction based entirely on sex is 'based on any other factor other than sex.' Sex is exactly what it is based on" (Pet. App. C–13).

[6] Judge Kilkenny, who had joined the original opinion, dissented from the denial of rehearing on the ground that the *General Electric* decision required, at a minimum, a trial on the issue of whether the "retirement plan was justified on the basis of recognized actuarial tables showing the difference in longevity between males and females" (Pet. App. D–4 to D–9).

ential treatment of women in the Department's retirement plan was explicitly and exclusively based on gender.[7] The court explained (Pet. App. D–2):

> A greater amount is deducted from the wages of every woman employee than from the wages of every man employee whose rate of pay is the same. How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a whole, longevity, and it disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that the difference is not based on sex is to play with words.

SUMMARY OF ARGUMENT

I

A. Petitioners' mandatory retirement allowance plan under which a "greater amount [was] deducted from the wages of every woman employee than from the wages of every man employee whose rate of pay [was] the same" discriminated "on the basis of sex alone" (Pet. App. D–2). One of the factors that an employer appropriately considers in funding a pension plan is the estimated longevity of his workforce, and sex is one factor relevant to longevity predictions. But petitioners not only separately determined

[7] The court also noted that unlike the under-inclusive disability benefits plan in *General Electric* the retirement plan is all-inclusive as to retirement benefits, but "it is discriminatory, on the basis of sex alone, as to costs to the employees" (Pet. App. D–2).

the longevity risks for male and female employees, but also allocated the total cost of the employee pension plan according to a solely sex-based classification. As the court of appeals concluded "[t]o say that the difference [in wage deductions] is not based on sex is to play with words" (Pet. App. D–2).

B. Explicit sex discrimination in the terms and conditions of employment is prohibited by Title VII of the Civil Rights Act of 1964 even if based on accurate generalizations concerning men and women as a class. 42 U.S.C. 2000e–2(a)(1), 42 U.S.C. (Supp. V) 2000e–2(a)(2). See *Dothard* v. *Rawlinson*, No. 76–422, decided June 27, 1977. The Title VII prohibition extends equally to discrimination in employment-related retirement plans based upon generalizations with respect to each sex, race, religion, or national origin. See *Chastang* v. *Flynn & Emrich Co.*, 541 F. 2d 1040 (C.A. 4); *Rosen* v. *Public Service Electric and Gas Co.*, 477 F. 2d 90 (C.A. 3). Indeed, assessment of deductions from employee wages based upon generalizations related to the employee's sex "is just the kind of abstract generalization * * * which Title VII was designed to abolish" (Pet. App. C–7).

C. The burden of paying approximately 15 percent more in return for a contingent future right to equal monthly pension payments substantially and adversely affected the take-home wages of individual women. During the course of some wage earners' careers, this disparity translated into wage differences of several thousand dollars. The contingencies associated with

the vesting of pension rights and the fact that most women and men (more than 80 percent) die at the same age means that most of these women will never receive the benefits that are said to offset this disadvantage. Nevertheless, because a small percentage of women live longer, all women were required to pay more, solely because of their sex, to receive the same contingent right to future periodic benefits. Similarly, because an equally small percentage of men die young, all men were accorded the benefit of reduced pension contribution costs.

D. A distinction with respect to the terms and conditions of employment explicitly based on membership in a class protected by Title VII (such as sex), if it can be justified at all under Title VII, must be justified by proof that "there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business" and that there are "available no acceptable alternative policies or practices which would * * * accomplish the business purpose * * * equally well with a lesser differential [discriminatory] impact." *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 798 (C.A. 4), certiorari dismissed, 404 U.S. 1006. The justification offered by petitioners for requiring differing contributions based upon sex was that "[s]ound actuarial practice requires * * * averaging of life expectancies of persons in ascertained classes (usually age and sex)" (A. 83).

The assessment of actuarial risk has traditionally been accomplished by reference to sex classes, but allocation of the cost by differential deductions from

employee wages based upon sex alone is "exceedingly rare" (Brief for the Society of Actuaries and the American Academy of Actuaries as Amici Curiae, p. 18). In addition, petitioners' plan has functioned without a sex-based cost allocation since 1975. The court of appeals therefore correctly held that petitioners could not show that differential contribution rates based upon sex were necessary to provide "a stable and secure pension program" (Pet. App. C–11). ,

Title VII does not mandate the actuarial mechanics of estimating the cost of ensuring employee risks, nor does it inhibit the use of all relevant actuarial data including the race or sex mix of a particular workforce in order to estimate total costs accurately. Nevertheless, sex-neutral actuarial tables that merge the differing life expectancies of men and women are an available and practical alternative. Merger of the risks of group members is valid as an actuarial matter. The differing life expectancies of smokers and non-smokers, for example, are curently merged in petitioners' actuarial tables, and a similar merger of the life experiences of black and white persons followed the abandonment of traditional race-based acutuarial tables by the life insurance industry. Sex-neutral tables do not assume that men and women have the same life expectancies. These tables reflect the impact of female longevity experience on the workforce and can be adjusted to reflect the female composition of a particular pension plan's employee group.

Irrespective of how the employer calculates the

total risk, Title VII precludes funding that risk by differential deductions from wages based upon a sex classification. An available alternative to a sex-based cost allocation is the system used by petitioners since 1975 under which all employees share equally the risk of the longer life expectancy of a small percentage of females and the shorter life expectancy of a small percentage of males, just as all of petitioners' employees share equally the life expectancy risks of smokers and non-smokers and black and white employees. Since plans that allocate costs by differential deductions from wages based upon sex are rare, the practical implications for employers of discontinuance of that method would be minimal. In sum, petitioners have offered no arguably adequate justification for denying female employees rights "based upon the fundamental Title VII precept that generalizations relating to sex, race, religion, and national origin cannot be permitted to influence the terms and conditions of an *individual's* employment" (Pet. App. C–21).

II

A. The Bennett Amendment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), incorporates the exceptions to the prohibitions of the Equal Pay Act into Title VII. *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 144. Petitioners argue that the fourth exception to the Equal Pay Act authorizing a wage "differential based on any other factor other than sex" insulates a practice of allocating pension

costs on the basis of sex irrespective of the Title VII prohibition (Pet. Br. 24). But, as the court of appeals stated, "it does not seem reasonable to us to say that an actuarial distinction based entirely on sex is 'based on any other factor other than sex.' Sex is exactly what it is based on" (Pet. App. C–13).

B. Despite the plain meaning of the statutory language, petitioners claim that the purpose of the fourth exception was to permit overtly sex-based classifications (Pet. Br. 15). But the legislative reports accompanying the Equal Pay Act emphasize that Congress intended the fourth exception as an authorization basically limited to sex-neutral classifications, "among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be excluded." H.R. Rep. No. 309, 88th Cong., 1st Sess. 3 (1963). That understanding is reflected in the Secretary of Labor's Interpretative Bulletin on the Equal Pay Act, which states that "[t]o group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purposes of the Equal Pay Act" (29 C.F.R. 800.151).

In litigation (*Wirtz* v. *Midwest Mfg. Corp.,* 58 CCH Lab. Cases. ¶ 32,070, 18 WH Cases 556 (S.D. Ill., devided August 9, 1968) and in an opinion letter (BNA Wage-Hour Manual 95:607), the Secretary of Labor has taken the position that the Equal Pay Act precludes

differential deductions from wages based upon sex irrespective of the alleged increased costs of providing benefits to females. This conclusion applies *a fortiori* to pension contributions, which afford many employees no concurrent protection or benefits but only a contingent future right to benefits.

C. Petitioners argue that the decision below conflicts with Section 800.116(d) of the Secretary of Labor's Interpretative Bulletin on the Equal Pay Act. That section suggests that a pension plan which paid greater benefits to one sex than another or under which an *employer* made unequal contributions based upon sex would not constitute an illegal wage differential. But Section 800.116(d), which is now under reconsideration by the Department of Labor, does not sanction, or even purport to address, petitioners' practice of requiring greater contributions from the wages of women *employees*, a practice explicitly forbidden by Section 800.151 of the same Interpretative Bulletin. No conflict exists, therefore, between the position of the Department of Labor and the Equal Employment Opportunity Commission with respect to the issues raised and decided in this case. Indeed, the language of the Equal Pay Act, its legislative history, and the consistent interpretation of the Department of Labor all lead to the conclusion that petitioners' sex-based wage differential does not fall within the claimed exception to the Equal Pay Act. That Act, therefore, did not authorize petitioners' explicitly sex-based wage distinction which, for the reasons stated in point I, *supra*, violated Title VII.

ARGUMENT

I

A POLICY OF DEDUCTING GREATER AMOUNTS FROM THE WAGES OF FEMALE EMPLOYEES THAN FROM THOSE OF MALE EMPLOYEES IN RETURN FOR A CONTINGENT FUTURE RIGHT AT AN EQUAL MONTHLY RETIREMENT ALLOWANCE VIOLATES TITLE VII

A. PETITIONERS' POLICY CONSTITUTED DISCRIMINATION BASED UPON SEX

Petitioners' retirement allowance plan classified employees into two contribution rate groups according to a single criterion, that of their sex. Although petitioners pay all similarly situated participants, male or female, the same monthly post retirement benefits, until December 31, 1974, they required women to make contributions to the retirement plan that were 14.84 percent greater than those required of males. The sole basis upon which the employee was assigned the lower or the higher contribution rate was the employee's sex. If a man, he paid the lower rate; if a woman, she paid the higher rate. This is an explicit gender-based classification. Its use for determining pension contributions violates Title VII, at least *prima facie* (see pp. 19–31, *infra*), because it discriminates against women on account of their sex in their compensation, terms and conditions of employment (Section 703(a)(1), 42 U.S.C. 2000e–2(a)(1)),[8] and because it is a

[8] Section 703(a)(1) of Title VII makes it an unlawful employment practice for an employer to "* * * discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *." 42 U.S.C. 2000e–2(a)(1).

classification based upon sex that adversely affects individual female employees (Section 703(a)(2), 42 U.S.C. (Supp. V) 2000e–2(a)(2)).[9]

Title VII bars unequal treatment of individual women and men based merely on stereotyped characterizations of the sexes. See, *e.g., Dothard* v. *Rawlinson*, No. 76–422, decided June 27, 1977, slip op. 12; *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (C.A. 7). Accordingly, the courts have consistently held that traits characteristic of the average person of one sex may not be used to justify employment decisions with respect to individual persons of that sex. For example, though it may generally be true that women as a class ("on the average") are less strong than men as a class, individual women may not be penalized by an employment decision excluding all women from a particular job requiring a particular degree of strength. *E.g., Rosenfeld* v. *Southern Pacific Company*, 444 F. 2d 1219 (CA. 9); *Bowe* v. *Colgate-Palmolive Comany*, 416 F. 2d 711 (C.A. 7). Similarly, an employer "cannot exclude *all* males [from the job of flight attendant] simply because *most* males may not perform adequately" (emphasis in original). *Diaz* v. *Pan American World Air-*

[9] Section 703(a)(2) of Title VII, 42 U.S.C. (Supp. V) 2000e–2(a)(2), states in relevant part that it shall be an unlawful employment practice for an employer "to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex * * *."

ways, Inc., 442 F. 2d 385, 388 (C.A. 5), certiorari denied, 404 U.S. 950.[10]

By analogous reasoning, explicit sex-based discrimination in retirement plans rationalized by statistically based generalizations concerning men and women also violates Title VII. It is unlawful to require women to retire earlier than men (*e.g., Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F. 2d 1186 (C.A. 7), certiorari denied, 404 U.S. 939), or to pay smaller periodic benefits to men who retire early than to women who retire early. *Chastang* v. *Flynn & Emrich Co.*, 541 F. 2d 1040, 1042–1043 (C.A. 4); *Rosen* v. *Public Service Electric and Gas Co.*, 477 F. 2d 90 (C.A. 3); *Fitzpatrick* v. *Bitzer*, 390 F. Supp. 278, 285–288 (D. Conn.), reversed on other grounds, 427 U.S. 445. The same principles require that individual women not be penalized by requiring all women to make greater pension contributions than all men, even if it be generally true that women as a class ("on the average") live longer than men as a class. As the court of appeals stated, this "is

[10] The policy at issue here differs somewhat from the policies at issue in the cited cases in that, while it is generally possible to predict prior to hire, on the basis of objective tests, which women and men would be able to perform a particular job, it is more difficult and probably not feasible for group insurance purposes to predict even generally how long any individual will live. On the other hand, it is not necessary for purposes of a group pension plan to devise a method for determining with precision the probable life expectancy of each individual in the group (see *infra*, pp. 28–30).

just the kind of abstract generalization * * * which Title VII was designed to abolish" (Pet. App. C–7).[11]

[11] There is no reason to treat this distinction on account of sex any differently under Title VII than one based upon race, religion, or national origin. If it were lawful under Title VII to require women to contribute more to a pension fund than similarly situated men, because of their greater average longevity, then it would presumably also be lawful, for example, to require non-Jews to contribute more than Jews ("By age 65 * * * [Jewish] mortality rates were higher than those for the total population at age 65." Fauman and Mayer, "Jewish Mortality in the United States," in Shiloh and Selavan, *Ethnic Groups of America: Their Morbidity, Mortality and Behavior Disorders*, Vol. I—The Jews, p. 36 (1973)); to differentiate between white and black employees (see Sutton, "Assessing Mortality and Morbidity Disadvantages of the Black Population of the United States," in Shiloh and Selavan, *Ethnic Groups of America: Their Morbidity, Mortality and Behavior Disorders*, Vol. II—The Blacks, p. 25 (1974)); or to require Mormons and Seventh Day Adventists to contribute more than persons of other religions ("* * * [T]he mortality rates for Mormons are substantially lower than those of the general population and similar to those of previously reported nonsmoking populations in the United States, including Seventh-day Adventists as a whole." Enstrom, "Cancer Mortality Among Mormons", 36 *Cancer* 825, 839 (1975) (footnotes omitted)).

In addition, although on the average women live longer than men, the relative differences in life expectancy vary from population to population. For example, while mortality data prepared by the State of California show that in the California population at large, women age 65–70 have a life expectancy 2.88 years greater than men of that age, similar data collected in the California Seventh Day Adventist (SDA) population show that California SDA women age 65–70 have a life expectancy only 1.55 years greater than California EDA men of that age. Lemon and Kuzma, "A Biologic Cost of Smoking," 18 *Archives of Environmental Health*, American Medical Association, 950, 952–953 (1969). The life expectancy of California SDA men even exceeds that of women in the California population at large until age 70 (*id.* at 953).

This burden of paying higher present contributions for a contingent future right to identical monthly pension payments substantially and adversely affects the wages of individual women. Although the female employee would receive precisely the same monthly retirement benefits as her male counterpart, she is required to pay approximately 15 percent more from her wages. During the course of a wage earner's career this disparity may translate into wage differences of several thousand dollars. Even among those who eventually qualify for a pension (see note 18, *infra*)[12] most women do not ever receive benefits that even arguably offset this wage disadvantage. Most men and women (more than 80 percent) die at the same age.[13] Petitioners' method of computing pen-

[12] With respect to those employees who will never qualify for a pension, the explicitly sex-based discrimination is more obvious. Even if the non-qualifying employees' contributions are returned to them at the time of their separation from employment, Title VII is violated by the deferment of a larger proportion of the compensation of women employees on the basis of their sex.

[13] More than 80 percent of men and women share common death ages. *Henderson* v. *State of Oregon*, 405 F. Supp. 1271, 1275 n. 5 (D. Ore.), appeal docketed, C.A. 9, No. 76–1706, March 30, 1976; *Reilly* v. *Robertson*, 360 N.E. 2d 171, 176 (Ind. Sup. Ct.), certiorari denied, No. 76–1635, October 3, 1977. This can be demonstrated using statistics attached to the Brief of the Teachers Insurance and Annuity Association of America and College Retirement Equities Fund as Amici Curiae in this case (Addendum A). The figures used in Table I, "Survival Experience of 100,000 Males and 100,000 Females Retiring at Age 65, Using 1951 Group Annuity Mortality Table" have been used below to show the distribution of age at death for the 100,000 men and 100,000 women represented in the TIAA–CREF Table:

sion contributions on the basis of sex thus puts the burden of the higher annuity cost attributable to the approximately 14–20 percent of the women who die "late" on women exclusively, and assigns the cost savings resulting from the deaths of the approximately 14–20 percent of the men who die "early" exclusively to the men (see, also note 18, *infra*).[14]

Age	Number of deaths		Number of women who can be paired with men dying in the same year
	Men	Women	
66–70	14,188	8,087	8,087
71–75	18,656	13,339	13,339
76–80	21,914	19,525	19,525
81–85	21,132	21,949	21,132
86–90	14,477	18,791	14,477
91–95	6,959	12,029	6,959
96 and over	2,674	6,280	2,674
Total	100,000	100,000	86,193

Thus, out of the original group of 100,000 men and 100,000 women, approximately 86,193 men and 86,193 women can be paired as dying within the same five year age span. The overlap in the distributions therefore covers more than 85 percent of the total group. The difference in the average life expectancy of men and women results from the percentage of men who die "early," unmatched by women's deaths (in the example above, approximately 14 percent of the men), and the percentage of women who die "late," unmatched by men's deaths (in the example above, approximately 14 percent). Bergmann and Gray, "Equality in Retirement Benefits," *Civil Rights Digest* 25 (Fall 1975). The data used in the chart above are divided into five year intervals. Use of data divided into one year intervals would produce only slightly different results.

[14] Petitioners' statement (Pet. Br. 5) that "[t]he contributions by the Department for a woman were always greater than for a corresponding man," is incorrect. Petitioners' answers to interrogatories below show that in half of the cases described in the record, the Department would have contributed more to the pension plan in conjuction with the employment of a male than in conjuction with the employment of the similarly situated female (R. 176). This results from the fact that the Department's contribution to the pension fund in conjunction with a given employee consists not only of the accumulated 110 percent matching contributions but also of "minimum pension" contributions, as well as the amounts needed to fund survivor benefits under the plan (see, *e.g.*, R. 176, 238–239.

Nothing in this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125, suggests that the imposition of these sex based burdens on employment is permissible under Title VII. In *Gilbert*, the Court found that the exclusion from a comprehensive disability plan of one physical condition with unique characteristics—pregnancy—did not, in itself, discriminate on the basis of sex. It considered the disability benefits plan as differentiating between pregnant women and all other nonpregnant persons, including nonpregnant women, *i.e.*, a distinction on a basis other than their sex.[15] By contrast, the pension plan here classified and distinguished between two groups of employees explicitly and exclusively on the basis of sex. "The high-

[15] Having found that the exclusion of pregnancy from the disability benefits plan was not *per se* gender-based discrimination, the Court analyzed the plan to determine whether, as a facially neutral plan, it had a gender-based discriminatory effect on one class, and found that it did not. 429 U.S. at 137–140. Here, this second inquiry into disparate impact is unnecessary because of the gender-based discriminatory nature of the pension plan. Even if inquiry into the effects of petitioners' pension system were necessary in this case, it is clear that here the burden placed upon female employees, with respect to their current compensation, is greater than that placed upon male employees. *Nashville Gas Co.* v. *Satty*, No. 75–536, decided December 6, 1977, slip op. 5. See *infra*, p. 36.

232-902—77——4

er contribution is required specifically and only from women as distinguished from men" (Pet. App. D–2).[16]

B. PETITIONERS HAVE SUGGESTED NO ADEQUATE BASIS FOR AN AFFIRMATIVE DEFENSE UNDER TITLE VII

What we have said thus far is sufficient, in our view, to dispose of this case. Petitioners have sug-

[16] Judge Kilkenny, dissenting from the denial of the petition for rehearing, concluded that this case is governed by *General Electric Co.* v. *Gilbert* because "the plan is facially nondiscriminatory to the extent that there is no risk for which one sex is covered and the other is not" and that there was no showing of gender-based effects because "the aggregate risk protection for men and women is identical" (Pet. App. D–6). This analysis fails to appreciate that unlike the *Gilbert* plaintiffs, respondents here do not challenge the risk coverage of the pension plan, which is all inclusive with respect to the risks faced by males and females alike. Respondents' challenge is instead addressed to the explicitly sex-based differential in assessments against wages by which the Department's plan is financed. No similar issue was raised or considered in *Gilbert* (which involved neither a contribution surcharge for those employees desiring or requiring pregnancy insurance nor a sex-based differential in employee contributions).

Moreover, the aggregate analysis of class risks and benefits has no place in a case challenging explicit sex discrimination. Aggregate analysis may be a useful tool in demonstrating whether facially neutral plans in fact have a gender-based effect. See *General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. at 138; *Nashville Gas Co.* v. *Satty*, *supra*, slip op. 8. However, this Court has never suggested that explicit discrimination on the basis of sex or race can be justified by a showing of offsetting benefits to the racial or sex class. Such a defense would be inconsistent with the overriding purpose of Title VII "to require employers to treat each employee * * * as an individual, and to make job related decisions about each employee on the basis of relevant individual characteristics, so that the employees' membership in a racial, ethnic, religious or sexual group is irrelevant to the decisions. *See Griggs* v. *Duke Power Co.*, 1971, 401 U.S. 424, 436" (Pet. App. C–7).

gested, however, that they can justify the practices at issue here by an affirmative defense analogous to a showing of business necessity (see A. 109–110, 116).

It is established under Title VII that practices which are neutral on their face, but which have a discriminatory effect on a class protected by Title VII, may be justified by the employer, as an affirmative defense, under the standards of business necessity applicable in Title VII cases. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431. In order to establish a "business necessity" defense, the employer must prove that "there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business" and that there are "available no acceptable alternative policies or practices which would better accomplish the business purpose * * * or accomplish it equally well with a lesser differential [discriminatory] impact." *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 798 (C.A. 4), certiorari dismissed, 404 U.S. 1006; see *Dothard* v. *Rawlinson, supra,* slip op. 10 n. 14.

Because the practices at issue here are not neutral on their face, the business necessity justification does not apply. At most, petitioners might attempt to rely on an analogous affirmative defense designed to show that practices which appear discriminatory on their face are not in fact discriminatory. If such a defense for an explicitly sex-based (or race-based or religion-based) policy is to be entertained at all, it should be justified under standards at least as stringent as those

applicable to the business necessity defense, in order to avoid unnecessary approval of precisely the sort of differentiation by class characteristic that Title VII was designed to eliminate. See *Craig* v. *Boren*, 429 U.S. 190, 208–209 n. 22.[17]

Petitioners argue, and we do not dispute, that the financial planning of a pension program requires the use of actuarial averaging of the varying longevity experiences of ascertainable groups because it is impossible to determine in advance when any particular individual will die, and that actuarial grouping traditionally has been accomplished by reference to sex. Initially, however, we have difficulty in understanding how this can serve to justify sex-based differences in the take-home pay of employees who do not currently qualify, and a substantial number of whom may never qualify, for pension rights.[18] Unlike, for example, con-

[17] Cf. *Dothard* v. *Rawlinson*, *supra*, slip op. 12, holding that the parallel bona fide occupational qualification (BFOQ) defense to explicitly sex-based discrimination must be extremely narrowly construed. The BFOQ defense is inapplicable to the type of discrimination at issue here since, by its terms, BFOQ concerns only allegations that the particular sex discrimination in "occupations" (such as in hiring or job assignments) is justified because it is necessary to the conduct of the business to have an employee of a particular sex perform certain tasks. *Dothard* v. *Rawlinson*, *supra*, slip op. 11–12. While the court of appeals here discussed petitioners' proferred defense in terms of a BFOQ defense, its analysis is in substance that applicable to a business necessity defense (see Pet. App. C–10 to C–12).

[18] Indeed, while life expectancies are relevant to the estimate of pension plan costs, "[f]or any given schedule of benefits the actual costs of a plan depend principally upon the number of participants who achieve benefit eligibility." Bernstein, *The Future of Private*

BEST COPY AVAILABLE

tributions for disability insurance or life insurance, the payment of pension contributions provides an employee who has not yet qualified for a pension with no present protection or benefit that could arguably be a co-existing offset to the burden of a sex-based reduction in current compensation. Moreover, since 1975 petitioners' plan has functioned, as most plans do (see p. 30, *infra*) without a sex-based contribution schedule. The court of appeals was therefore obviously correct in pointing out that while the use of sex as an actuarial class may assist pension administrators in predicting costs and benefits more accurately, that does not mean that "providing a financially sound pension plan requires [establishing contribution rates according to] an actuarial classification based wholly on sex" (Pet. App. C–11).

The analogous practice of utilizing racial criteria in assessing life insurance costs provides a useful reference for analyzing petitioners' proferred justification for sex-based distinctions. For years, it was customary for the insurance industry to use race-based actuarial criteria as the basis for charging blacks higher life

Pensions 39 (1964). One survey indicates that women, in general, who are covered by pension plans are less likely than men to have vested rights. Kolodrubetz and Landay, "Coverage and Vesting of Full-Time Employees Under Private Retirement Plans," *Social Security Bulletin* 20, 27 (November 1973). Among retiring workers in another survey, 46 percent of the men and only 21 percent of the women were entitled to pension benefits, and the median benefit for entitled women was only $970 per year, as compared to $2,080 for men. Kolodrubetz, "Private Retirement Benefits and Relationship to Earnings: Survey of New Beneficiaries," *Social Security Bulletin* 16 (May 1973).

insurance rate than whites. See, *e.g.*, James, *The Metropolitan Life: A Study in Business Growth* 338–339 (1976). This practice was defended as racially neutral and non-discriminatory because it was "dictated entirely by actuarial findings" (*id.* at 338).[19] The assessment of different life insurance rates for blacks and whites on the basis of race, though a valid choice as an actuarial matter, is now prohibited by state legislation (*ibid.*). Actuaries have noted the parallel between the industry experience with race-based and sex-based criteria:

> Federal government pressure via the EEOC for treating males and females in exactly the same way recalls to mind the fact that the government took a similar position some decades ago with respect to race and imposed a requirement that insurance companies charge exactly the same premiums for the same coverage irrespective of race, in spite of the fact that all the published mortality experience then available, including the mortality statistics published with every decennial census, indicated clearly that there were very significant differences in mortality rates and trends by race.[20]

[19] "Mortality studies * * * showed that the colored death rates were running substantially in excess of the white. It was clearly improper to continue writing both on the same premium rates. That would have been discrimination against the whites" (*id.* at 339).

[20] Fellers and Jackson, "Noninsured Pensioner Mortality: The UP–1984 Table," 25 *Proceedings, Conference of Actuaries in Public Practice* 456, 459 (1976). "UP–1984" stands for Unisex Pension—1984.

Similarly, actuarial tables based upon sex, while customarily used, can be replaced by alternative groupings that are equally valid as actuarial pools. Since neither segregation nor merger of life expectancy experience by sex is in itself actuarially unsound, at least with respect to group insurance,[21] the differing average life expectancies of women as a class and men as a class can be merged in calculating total

[21] Risk classification in group insurance differs significantly from risk classification in individual insurance. In the latter, the factors affecting the particular individual's risk are computed as precisely as possible. See Shepherd and Webster, *Selection of Risks* 6 (1957). But in group insurance, most of these different risks are pooled among all the participants.

Amici Teachers Insurance and Annuity Association of America and College Retirement Equities Fund argue that under a sex-neutral contribution scheme "the employer or insurer would be forced to take some of the funds contributed by and for the men and pay those funds to the women," and that "[t]his would be discriminatory in the extreme" (Br. 24). For reasons previously discussed, however, that argument is unpersuasive with respect to pension contribution differentials (which are all that is at issue here), which involve sex-based differences in take-home pay in return for a contingent future right to pension payments. Nor, in our view, do similar considerations mean that Title VII requires the level of periodic payments to pensioners under a plan to be differentiated according to sex. The essence of a group pension benefit plan, like group disability insurance coverage, is not that all covered individuals will receive proportional aggregate benefits, but that all participants are assured of benefits for their covered individual needs that actually arise. So long as a plan provides for the same level of benefits for all covered individuals, male or female, for as long as individually needed, it is consistent with Title VII. Title VII does not require differentials in either pension contribution levels or pension payment levels on the basis of sex, any more than it requires them on the basis of race or religion. See note 11, *supra*. See, also, notes 27, 33, *infra*.

pension risks. The use of merged life expectancy tables pools the risks of those groups with different mortality experiences whose risks are not separately calculated. In fact, numerous categories of risk are merged in any single classification actuarial table. For example, the different life expectancy experience of smokers and non-smokers is "merged" in petitioners' actuarial calculations.[22] Use of a merged, sex-neutral table involves a similar pooling, and "the use of mortality rates on a single 'unisex' basis has been found quite practical for non-insured plans." [23] Fellers and Jackson, *supra,* at 458.

Merging the longevity experiences of men and women does not require "resort to an assumption (women and men of the same age have equal life expectancy) that is demonstrably false" (Brief of Teachers Insurance and Annuity Association, p. 23). Sex-neutral tables reflect the impact of female longevity experience on the workforce and can be adjusted

[22] See *Chart Book on Smoking, Tobacco, and Health*, U.S. Department of Health, Education and Welfare, Public Health Service, Publication No. CDC 75–7511, p. 12 (revised 1972). If smokers and non-smokers receive the same periodic benefits in a merged group, the smokers make greater contributions and the non-smokers smaller contributions, than they would if their experience were segregated.

[23] Petitioners' pension program is a non-insured plan. See Brief for the Society of Actuaries, p. 5.

to reflect the female composition of a particular pension plan's employee group.[24] Title VII does not preclude the consideration of all relevant actuarial data including the sex or race mix of a particular workforce in order to estimate as accurately as possible the total cost of the pension plan. Actuaries themselves have recognized that the government "is not questioning the fact that differences in mortality rates for males and females have been observed in the

[24] Fellers and Jackson, who have developed a sex-neutral mortality table, have explained how it would function:

> The UP–1984 Table has been developed as a composite mortality table which, if used without adjustment, is appropriate for the valuation of pension plans covering groups having a 10-30 per cent female content. The table can be set forward one year in age for use with groups with less than 10 per cent female content, set back one year in age for groups having 30-50 per cent female content, and so on. The use of a composite table for the actuarial valuation of pension benefits should not be considered less accurate or less scientific than the use of sex-segregated mortality tables, because statistically significant data relative to the differentials by sex in pay-increase factors, early retirement rates, disability retirement rates, and rates of withdrawal from service generally are not available on a company-by-company or even an industry-wide basis. The costs of projected pensions must thus be based on so many estimates and assumptions that are not subject to accurate delineation by sex that the use of sex-segregated mortality rates is a refinement in the actuarial valuation process that is not justified on statistical or financial grounds.

Fellers and Jackson, *supra*, note 20, at 483–484.

past, nor that such differences must be considered in estimating costs for the future." [25]

Title VII does, however, preclude differential deductions from wages governed by a sex or race based allocation of the total cost of a pension plan. An obvious alternative is that used by petitioners since 1975—that employees share equally the risk of longer life expectancy by a small percentage of females and shorter life expectancy by a small percentage of males. The American Council of Life Insurance (Br. 44) argues that such equal sharing of risks by all employees "violate[s] the basic insurance concept * * * that only applicants who are exposed to comparable degrees of risk should be placed in the same premium class." Whatever the merits of that view as to individual insurance,[26] it is unpersuasive in the context

[25] Fellers and Jackson, *supra*, note 20, at 482. Thus we do not contest that the sex mix of a particular pensioner group may be considered in order to determine the total estimated cost of a pension plan. A plan with a pensioner population that is 90 percent female will ultimately have to pay out a greater amount of benefits than a plan with a pensioner population that is only 10 percent female. The same type of difference is true of a pensioner population that has 90 percent nonsmokers as compared to only 10 percent nonsmokers.

[26] The dissenting judge in the court of appeals thought it significant that a female who purchased an annuity as an individual from a commercial insurance company would have paid more than her male counterpart (Pet. App. D–7). However, the fact that private insurance companies make explicit sex based distinctions, as they once made explicit race based distinctions, in setting rates does not insulate employers who establish insurance programs from their obligations under Title VII. The commercial sale of insurance is not a term or condition of employment and therefore is not subject

of group insurance in which by definition costs are divided equally among group members, many of whom are differently situated. For example, under petitioners' plan the cost of longer average life expectancies of non-smokers is shared equally by smokers and non-smokers alike and both black and white employees share equally in the cost of longer average life expectancies of white employees. In any event, as the brief of the Society of Actuaries and the American Academy of Actuaries acknowledges, there are important exceptions to the concept of "actuarial equity," one of which is that "certain classifications which may be perfectly feasible from an actuarial standpoint may be barred by others for reasons of social policy" (Br. 11). Title VII represents a congressional policy decision that sex-based distinctions with respect to employment, however feasible, traditional or convenient, cannot (except in certain narrowly limited circumstances) be the basis of decisions with respect to wages and terms and conditions of employment.

The Brief Amicus Curiae of American Council of Life Insurance suggests that "[t]he decision below * * * will require radical changes in the pension and retirement coverage available to American workers" (Br. 42). Those fears are unsupportable. The decision below held only that employer self-insured pension plans cannot differentiate between men and women with

to the statutory prohibition in Title VII against race or sex discrimination. By contrast, the provision of insurance as an incident to employment does trigger the Title VII prohibition against discrimination on the basis of sex or race.

respect to deductions from wages. As the Brief for the Society of Actuaries and the American Academy of Actuaries as Amici Curiae notes (p. 18), "[m]ost defined benefit plans are noncontributory." As to the minority that require employee contributions, those contributions "are almost always—unlike the plan in the case at bar—unrelated to age or sex" (*ibid.*). The brief concludes, "[s]ince defined benefit plans which provide for different contribution rates for male and female employees are exceedingly rare, there would not be a widespread effect if equal employee contribution rates were to be required in the case at bar" (*ibid.*).

Tradition and ease of administration are therefore insufficient justification for the use of a prohibited criterion here, especially in light of the available nondiscriminatory option of utilizing general, sex-neutral actuarial tables that are of equal actuarial validity. Petitioners' discontinuance as of January 1, 1975, of its sex-based policy in favor of equal contribution rates for male and female employees belies any claim that its previous sex differentiated contribution rates were necessary to an actuarially sound pension plan. The courts below therefore properly found that petitioners' proffered justifications could not, in the circumstances of this case, show that differential contribution rates based exclusively on sex were essential to the "business function" of providing employees with "a stable and secure pension program" (Pet. App. C–11). Nor, for the reasons we have previously dis-

cussed, could petitioners show that its plan of unequal current takehome pay, in return for the possibility of a future right to equal periodic pension payments, was nondiscriminatory in operation. It was, accordingly, proper to grant summary judgment in favor of the respondents, and this Court should affirm the decision of the court of appeals, which correctly is "based upon the fundamental Title VII precept that generalizations relating to sex, race, religion, and national origin cannot be permitted to influence the terms and conditions of *an individual's* employment" (emphasis in original) (Pet. App. C–21, quoting EEOC Dec. No. 75–146, January 13, 1975, CCH Employment Practices Guide, ¶ 6447, p. 4191).[27]

[27] In 1966 the EEOC's General Counsel issued an opinion letter which, without particular reference to pension plans, can be read to approve generally the type of practice here. 401 F.E.P. Rep. 3011–3012. This was not a binding Commission opinion. See 35 Fed. Reg. 18692. The EEOC's position has evolved. The EEOC's original Sex Discrimination Guidelines primarily addressed the most obvious forms of sex-based discrimination and did not discuss retirement and pension plans. 30 Fed. Reg. 14926–14928. In 1968, the EEOC amended its Guidelines, referring formally for the first time to pension and retirement plans, stating specifically that a difference in optional or compulsory retirement ages based on sex violates Title VII, and, more generally, that "[o]ther differences based on sex, such as differences in benefits for survivors, will be decided by the Commission by the issuance of Commission decisions in cases raising such issues." 33 Fed. Reg. 3344. The EEOC issued the present more detailed Sex Discrimination Guidelines in 1972. 37 Fed. Reg. 6835–6837. Those guidelines state that it is an unlawful employment practice for an employer to "discriminate between men and women with regard to fringe benefits," or to have a pension plan which "differentiates in benefits on the basis of sex" (29 C.F.R. 1604.9(b), (f)), and "[i]t shall not be a defense under title VIII [sic] to a charge

II

A REQUIREMENT THAT FEMALE EMPLOYEES CONTRIBUTE MORE TO A PENSION PLAN THAN SIMILARLY SITUATED MALE EMPLOYEES VIOLATES THE EQUAL PAY ACT

The Bennett Amendment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(h), incorporates the exceptions to the prohibitions of the Equal Pay Act into Title VII by authorizing wage differences if "such differentiation is authorized by the provisions of section 206(d) of Title 29 [the Equal Pay Act]."[28] The Equal Pay Act provides in pertinent part:

---

of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other" (29 C.F.R. 1604.9 (e)).

In an area as complex as employment discrimination, evolving positions are to be expected. Congress recognized as much in acknowledging in 1972 that its perception of the nature of employment discrimination had evolved. S. Rep. No. 92–415, 92d Cong., 1st Sess., p. 5 (1971). Even if the EEOC's 1972 guidelines on this matter did constitute a significant change in its interpretation, they are nevertheless entitled to great weight because they are based upon the Commission's "cumulative experience." *National Labor Relations Board* v. *Weingarten, Inc.*, 420 U.S. 251, 266; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349. See *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94; cf. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 140–145.

[28] *General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. at 144. Petitioners argue that a colloquy between Senators Randolph and Humphrey (cited by this Court in *General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. at 144) during debate on Title VII demonstrates that Congress contemplated that the practice here at issue would be lawful under the Equal Pay Act. The exchange reads, in its entirety, as follows (110 Cong. Rec. 13663–13664 (1964)):

> Mr. RANDOLPH. Mr. President. I wish to ask of the Senator from Minnesota [Mr. Humphrey], who is the effective manager of the pending bill, a clarifying question on the provisions of title VII.
>
> I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing.
>
> Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law?
>
> Mr. HUMPHREY. Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it.

Although this interchange is not without ambiguity, it appears to have been intended primarily as an assurance that the Equal Pay Act and its exemptions would be incorporated into Title VII. It does not purport to be a careful consideration of the meaning of the Equal Pay Act itself as it applies to industrial benefit plans. Since the interchange occurred one year after the passage of the Equal Pay Act, it would hardly be a reliable indication of Congress' intent in enacting that legislation. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 354 n. 39. In fact, the social security provisions referred to by Senator Randolph were held unconstitutional in *Califano* v. *Goldfarb*, 430 U.S. 199; the retirement options (which do not constitute wage differentials) are not covered by the Equal Pay Act, and differential retirement ages have consistently been held unlawful (see cases cited, *supra*, at 15). At all events, the interchange makes no reference to sex-based distinctions in deductions from wages, and any attempt to read it as suggesting that such distinctions would be authorized would be inconsistent with the balance of the legislative history as we demonstrate herein.

> No employer * * * shall discriminate, within any establishment * * *, between employees on

> the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex * * * for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex * * *. [29 U.S.C. 206(d)(1).]

Petitioners argue that the fourth exception to the Equal Pay Act, allowing "a differential based on any other factor other than sex," permits a sex-based allocation of pension plan costs irrespective of what would otherwise be a Title VII violation (Pet. Br. 24). However, as the court of appeals stated (Pet. App. C–13):

> it does not seem reasonable to us to say that an actuarial distinction based entirely on sex is "based on any other factor other than sex." Sex is exactly what it is based on.

The legislative history of the Equal Pay Act as well as administrative interpretation by the Department of Labor support the conclusion drawn from the plain meaning of the statute that the fourth exception cannot be invoked to insulate petitioners' plan from Title VII scrutiny.

Congress' purpose in passing the Equal Pay Act was to "eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from [them]." *Shultz* v. *Wheaton Glass Company*, 421 F. 2d 259, 265 (C.A. 3); see also *Shultz* v. *American Can Company-Dixie Products*, 424 F. 2d 356, 360 (C.A. 8). See also Section 2(a) of the Equal Pay Act, 77 Stat. 56; Section 2(a) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. 202(a). As stated by Senator Hart during the debates on the equal pay bill (109 Cong. Rec. 8916 (1963)):

> Women are working to earn a living, to support families or to contribute to the family's ability to send the children to college—in addition to whatever personal sense of achievement may be involved. The supermarket does not have a special price on its groceries for women, the doctor does not have a special rate for them, their rent is not based on sex. Why then do we allow a pay differential to continue which gives them a smaller paycheck than others performing the same work?

A violation of the Equal Pay Act occurs if the take-home pay of members of one sex is less than that of members of the other sex, performing the same work regardless of whether they are paid the same basic salary. Payments made to satisfy the wage requirements set forth in Section 6 of the Fair Labor Standards Act, 29 U.S.C. 206 (which contains the Equal Pay Act, 29 U.S.C. 206(d)), must be "unconditional"—*i.e.*, they must be "free and clear", *Brennan* v. *Veterans Cleaning Service, Inc.*, 482 F. 2d 1362, 1369 (C.A. 5), and the employee must actually have use of the money. See, *e.g.*, *Shultz* v. *Hinojosa*,

432 F. 2d 259 (C.A. 5); *Veterans Cleaning Service, Inc., supra; Brennan* v. *Heard*, 491 F. 2d 1, 3–4 (C.A. 5). Here the women's wages were not "equal" to the men's since part of their wages had to be paid back in the form of an additional contribution to the pension plan.[29] The women thus had "unconditional" control of a smaller wage than the men; they had less money "to allocate * * * among competing economic and personal interests" (*Brennan* v. *Heard, supra,* 491 F. 2d at 4). Absent some exception, this unequal pay scheme would constitute a violation of the Equal Pay Act.

To justify an exemption for their unequal pay scheme from both the Equal Pay Act and Title VII, petitioners claim that the purpose of the exemption authorizing "a differential based on any other factor other than sex" (29 U.S.C. 206(d)(1)(iv)) was to permit overtly sex-based classifications (Br. 15), but the plain meaning of the language "other

[29] Even if it is assumed (since there is no record on this point) that a women terminating her employment with the petitioner employer could at that time withdraw her own contributions, which, because of the higher contribution required by the plan, would exceed the amounts accumulated by a similarly situated man, that would not cure the equal pay violation even with respect to such non-pensioners. The wages required by the Fair Labor Standards Act must be paid promptly (*Rigopoulos* v. *Kervan*, 140 F. 2d 506, 507 (C.A. 2)). The possible recoupment of a lump sum many months or years later does not satisfy the requirement of equal pay (cf. *Roland Electrical Co.* v. *Black*, 163 F. 2d 417, 421 (C.A. 4), certiorari denied, 333 U.S. 854); nor does it meet the Act's purpose of increasing the wages of women workers so that they can enjoy a better living standard. Money which may or may not be recouped at some later indefinite time does not pay bills or mortgage payments. *Brooklyn Bank* v. *O'Neil*, 324 U.S. 697, 707–708 and n. 20.

than sex" is to preclude rather than permit sex-based pay decisions. Moreover, the reference to "any other factor" suggests by its terms that the first three sex-neutral exceptions, (1) seniority, (2) merit, and (3) quantity or quality of production, are examples. Congressman Griffin, a supporter of the Equal Pay Act, made that understanding explicit, stating "[r]oman numeral iv is a broad principle, and those preceding it are really examples" (109 Cong. Rec. 9203 (1963)).

The legislative reports emphasize that Congress intended the fourth exception as an authorization basically limited to sex-neutral classifications.[30] As reported by the Senate Committee on Labor and Public Welfare, the bill (S. 1409) provided one exception to the equal pay for equal work principle, "where such a wage differential is based on any factor or factors other than sex." The exception examples cited in the Committee Report make clear that the factors upon which the differential is based must relate to sex-neutral distinctions and not some generalization with respect to women as a whole. Thus "seniority systems are valid exceptions provided they are based on tenure and not upon sex," as is "a merit system or piecework system which measures either the quantity or quality of production or performance" (S. Rep. No. 176, 88th Cong., 1st Sess., p. 4 (1963)). The House Committee bill (H.R. 6060) contained the general exception contained in the Senate bill, as well as the three specific exceptions that now appear in the Act. The House

[30] The extremely narrow possible exception to this limitation is discussed *infra*, pp. 39–41.

Committee on Education and Labor also emphasized that its intent was to exempt sex-neutral distinctions (H.R. Rep. No. 309, 88th Cong., 1st Sess., p. 3 (1963)):

> [A]ny discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded.

Petitioners' claim (Br. 15) that the exception was intended to justify differential payments based upon a sex classification is totally inconsistent with this legislative history.[31] Supporters of the Equal Pay Act

[31] The dissenting judge below noted (Pet. App. D–8) that the Pension Benefit Guaranty Corporation (PBGC), which insures benefit plans under the Employee Retirement Income Security Act, had recognized the use of sex segregated actuarial tables in adopting interim regulations. The PBGC has used sex-based mortality tables to value benefits in order to relate its valuation rates to the anticipated actual cost of guaranteeing participants' pensions. 29 C.F.R. Part 2610, 41 Fed. Reg. 48484, 48489 (November 3, 1976). The PBGC has adopted final regulations for determining the maximum benefits guaranteed each participant under Title IV of ERISA (see 29 C.F.R. 2609.4); it there required the use of sex-neutral factors because "it felt that all participants of the same age should receive the same benefit protection from PBGC, regardless of the participant's sex in recognition of the similar needs of all retired workers" (41 Fed. Reg. 6194, 6195). Moreover, in providing in ERISA for the rights of participants in private pension plans to an accrued benefit derived from their own contributions, Congress required the annuity to be calculated on the basis of specified factors which do not include any reference to sex. See 29 U.S.C. (Supp. V) 1054(c)(2).

did indicate that Congress intended to permit a facially sex-neutral classification even if it had a statistically different effect on male and female workers. Congressman Griffin stated (109 Cong. Rec. 9206 (1963)):

> Some say that women are prone to absenteeism—some women may be and other women may not be prone to absenteeism. So long as the differential is made on the basis of such factors as absenteeism, or on the basis of time actually worked, and not on the basis of sex, then the wage differential will not violate this legislation.

But Congress never indicated that a statistical showing of the kind proferred by petitioners would justify an overtly sexual classification as a proper basis for a wage differential. See 29 C.F.R. 800.142–800.148.

Petitioners assert that both houses of Congress "considered longevity as a basis for adding the general exception to the Equal Pay Act" (Pet. Br. Exh. C–3, n. 2). The Senate Report did consider the problem posed by "the longer life span of women in pension benefits" (S. Rep. No. 176, *supra*, at 4) and appears to have recognized the possibility that upon a proper showing the Secretary "can permit an exception" based upon class-based costs (*ibid.*). That understanding is not reflected elsewhere in the legislative history. More importantly, the Senate Report emphasizes that any such wage differentials cannot be justified, as petitioners attempt to do here, by reference to a single item of cost, but only upon the basis of a

demonstration with respect to "all of the elements of the employment costs of both men and women" (*ibid.*).

The Senate Report states (S. Rep. No. 176, *supra*, at 4; emphasis added):

> During the course of the hearings, testimony was introduced on the question of the cost which employers encounter in the employment of women which they do not encounter in the employment of men. * * * Some employers stated that the cost of their pension and welfare plans were higher for women than men because of maternity costs in their health benefits and because of the longer life span of women in pension benefits.
>
> This question of added cost resulting from the employment of women is one that can be only answered by an ad hoc investigation. Evidence was presented to indicate that while there may be alleged added costs, these were more than compensated for by the higher productivity of women against men performing the same work and that the overall result for the employer was a lesser production cost than would result from the hiring of only men. Furthermore, questions can legitimately be raised as to the accuracy of defining such costs as pension and welfare payments as related to sex. It has been pointed out that the higher susceptibility of men to disabling injury can result in a greater cost to the employer, and that these figures as to health and welfare costs can only be applied plantwide. It may be that it is more expensive to hire women in one department but it is more expensive to hire men in another, and overall cost figures may demonstrate conclusively that the employer has made a sound decision to hire women and pay them on an equal basis.
>
> It is the intention of the committee that *where it can be shown that, on the basis of all of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential,* the Secretary can permit an exception similar to those he can permit for a bona fide seniority system or other exception mentioned above.

Thus, nothing in the legislative history of the Equal Pay Act indicates that wage differentials can be justified on the basis of average cost of a *single* item (*e.g.*, pension insurance) grouped by sex.

Petitioners seek support for a contrary view of the Act's requirement in Section 800.116(d) of the Secretary's Interpretative Bulletin (29 C.F.R. 800.116(d)). That Section provides that it shall not constitute an illegal wage differential for a pension plan to pay greater benefits to one sex than to the other if the *employer's* contributions are equal for men and women, and that the mere fact that the *employer* may make unequal contributions for employees of opposite sexes will not be considered to be an illegal wage differential if the resulting benefits are equal for similarly situated employees.[32] Section 800.116(d) does not

[32] The Interpretative Bulletin provides that:

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and

sanction petitioners' practice of requiring greater contributions from the wages of their women *employees* in order to offset the average increased cost of their pension benefits.[33] The Secretary of Labor has never approved a practice of requiring female employees to make contributions to a pension plan which are larger than those required of similarly situated male employees. Indeed, the Secretary's Interpretative Bulletin on Equal Pay states in pertinent part that (29 C.F.R. 800.151; emphasis added):

> A wage differential based on claimed differences between the *average* cost of employing the employer's women workers as a group and

---

women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees. [29 C.F.R. 800.116(d).]

[33] *Amici* have emphasized the conflict between the EEOC Guidelines and Section 800.116(d) of the Wage and Hour Administrator's Interpretative Bulletin. However, there is no conflict in this case since it is Section 800.151 (discussed in the text, *infra*), not 800.116(d), which is applicable to the practice at issue. Even though there is therefore no conflict for this Court to resolve in this case, we note that the EEOC Guidelines were amended in 1968 and 1972, after experience with Title VII of the Civil Rights Act, while the Wage-Hour interpretations were issued in 1965–1966 and have not been updated to reflect experience and judicial interpretations. The Department of Labor is currently reconsidering 29 C.F.R. 800.116(d).

> the *average* cost of employing the men workers as a group does not qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act. *Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed,* because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibilty.

The Secretary of Labor has taken the same position in litigation. In *Wirtz* v. *Midwest Mfg. Corp.*, 58 CCH Lab Cases ¶ 32,070, 18 WH Cases 556 (S.D. Ill., decided August 9, 1968), the Secretary of Labor brought an Equal Pay Act suit to eliminate a sex-based wage differential. The company claimed that the differential was justified as "a factor other than sex" because of the additional cost required to provide its women employees equal unemployment compensation, workmen's compensation, and accident and health insurance. The court, in a consent decree filed by the parties, ruled that a wage differential based on

"claimed differences between the average cost of employing women employees *as a group* and the average cost of employing men employees *as a group* * * * does not qualify as a differential based on any 'other factor other than sex' " (Concl. of Law, 7, 18 WH Cases at 560–561; emphasis in original).

Finally, in an opinion letter dated June 18, 1964,[34] the Administrator of the Wage and Hour Division of the Department of Labor addressed the question whether an employer could maintain an hourly wage differential based on data showing that pension benefits, hospitalization and medical insurance, turnover costs and rest period benefits cost more per hour for woman than for men. The Administrator disapproved the wage differential, stating that the "factor other than sex" exception (29 U.S.C. 206(d)(1)(iv)) could not be claimed where the employer had analyzed only some but not "all of the elements of employment costs."

The issue involved in this case, in *Midwest Mfg. Corp.* and in the Administrator's opinion letter is basically the same—whether the asserted extra cost of providing female employees with pension or other benefits permits the employer to compensate women with lower take-home pay than similarly situated male employees.[35] The language of the Equal Pay Act, its

[34] The opinion letter is published in BNA Wage-Hour Manual 95:607.

[35] Indeed, the conclusion in the present case follows *a fortiori* from *Midwest* and the opinion letter because women employees here who have not yet qualified for a pension are receiving no concurrent protection or benefit in return for the reduction in their take-home pay.

legislative history and the consistent interpretation of the Department of Labor compel the conclusion that this practice does not fall within the exemptions to the Equal Pay Act. That Act, accordingly, did not authorize petitioners' plan which, for the reasons discussed in point I, *supra,* violated Title VII's prohibition of discrimination on the basis of sex.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
DREW S. DAYS, III,
Assistant Attorney General.
LAWRENCE G. WALLACE,
Deputy Solicitor General.
THOMAS S. MARTIN,
Assistant to the Solicitor General.
BRIAN K. LANDSBERG,
CYNTHIA L. ATTWOOD,
Attorneys.

ABNER W. SIBAL,
General Counsel,
JOSEPH T. EDDINS,
Associate General Counsel,
BEATRICE ROSENBERG,
Assistant General Counsel,
MARY-HELEN MAUTNER,
Attorney,
Equal Employment Opportunity Commission.

DECEMBER 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977

FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, *et al.*,

Petitioners,

—v.—

MARIE MANHART, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

MATTHEW W. FINKIN
General Counsel
American Association of
University Professors
Southern Methodist
University School of Law
Dallas, Texas 75275

RUTH BADER GINSBURG
SUSAN DELLER ROSS
KATHLEEN WILLERT PERATIS
MARJORIE MAZEN SMITH
BRUCE J. ENNIS
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Amici Curiae

TABLE OF CONTENTS

PAGE

Interest of Amici 1

Opinions Below 4

Statutes and Regulations Involved 5

Question Presented 8

Statement of the Case 8

Summary of Argument 8

ARGUMENT:

I. Providing all Female Employees Less Take-Home Pay than all Similarly-Situated Male Employees Because Women "on the Average" Live Longer Than Men Violates Title VII of the 1964 Civil Rights Act 14

A. The Employer Policy at Issue Classifies Employees on the Basis of "Gender as Such" in Violation of Section 703(a) of Title VII 14

B. The Traditional Insurance Custom of Computing Mortality Rates on a Sex-Segregated Basis Does Not Constitute a Defense to an Employer Policy of Overtly Discriminating Against Female Employees by According Them Either Lower Take-Home Pay or Lower Retirement Benefits Than Identically-Situated Male Employees 25

PAGE

1. The Employer Defense: Cost .....
2. Insurance Industry Objections .....
   a. Insurers' Reliance on Group-Based Experience 32
   b. Equity and Risk Classification 36
   c. Adverse Selection 39

C. The Bennett Amendment Provides No Defense to an Employer Policy of Paying Women Lower Take-Home Wages or Retirement Benefits Than Men 44

1. Section 703(h) does not provide an exemption for the overtly sex-based wage policy at issue .....
2. The Humphrey-Randolph colloquy does not indicate a Congressional intent to allow gender lines which operate to the detriment of women workers 48
3. The Wage and Hour Administrator's interpretive regulation, 29 C.F.R. §800.116(d), s not entitled to deference 51
4. EEOC's guidelines on pension plans are entitled to deference 59

II. The Decision Below Accords With This Court's Principal Equal Protection/Gender Classification Decision 63

PAGE

III. Congressional Authority Under Section 5 of the Fourteenth Amendment and the Commerce Clause Plainly Supports Application of Title VII's Ban on Sex Classification to the Case at Bar 66

CONCLUSION 68

APPENDIX:

Order 69

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 30

Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971) 21, 22, 42, 49

Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) 18

Califano v. Goldfarb, 430 U.S. 199 (1977) 13, 16, 35, 43, 50, 63, 64, 65

Califano v. Webster, 97 S. Ct. 1192 (1977) 21, 42, 49, 50

Chastang v. Flynn & Emrich Co., 541 F.2d 1040 (4th Cir. 1976) 20

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 30, 46, 47, 54

Craig v. Boren, 429 U.S. 190 (1976) 13, 39, 63, 64, 65

Dothard v. Rawlinson, 97 S. Ct. 2720 (1977) 14, 15, 16, 17, 18, 19, 26, 27, 29

PAGE

Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) 27, 30

EEOC v. Colby College, 15 FEP Cases 1363 (D.Me. Nov. 17, 1977) 19, 20

Fillinger v. East Ohio Gas Co., 4 FEP Cases 73 (N.D. Ohio 1971) 21, 22
Fitzpatrick v. Bitzer, 390 F.Supp. 278 (D.Conn. 1974), *appealed on other grounds*, 427 U.S. 445 (1976) 21, 66
Frontiero v. Richardson, 411 U.S. 677 (1973) 50, 65

Geduldig v. Aeillo, 417 U.S. 484 (1974) 65
General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 12, 14, 15, 18, 29, 50, 51, 53, 59, 63, 65

Henderson v. Oregon, 405 F. Supp. 1271 (D.Ore. 1975) 16, 19
Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973) 46, 54

Katzenbach v. Morgan, 384 U.S. 641 (1966) 67

Laffey v. Northwest Airlines, —— F.2d ——, 13 FEP Cases 1068 (D.C. Cir. 1976) 46
Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45 (1959) 66
Lewis v. Cohen, 417 F. Supp. 1047 (E.D. Pa. 1976) 50

Manhart v. City of Los Angeles, 553 F.2d 581 (9th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3214 (Oct. 3, 1977) 16, 46, 49
Mathews v. Lucas, 427 U.S. 495 (1976) 43
McCulloch v. Maryland, 4 Wheat. 316 (1819) 67

PAGE

Nashville Gas Co. v. Satty, 46 U.S.L.W. 4026 (Dec. 6, 1977) 18, 53
National League of Cities v. Usery, 426 U.S. 833 (1976) 67

Peters v. Missouri Pacific R.R., 483 F.2d 490 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973) 21
Peters v. Wayne State University and TIAA-CREF, Civ. Act. No. 6-70165 (E.D. Mich.) 16, 19, 20, 30, 34, 37
Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 14, 15, 18

Read v. Reed, 404 U.S. 71 (1971) 65
Reilly v. Robertson, 360 N.E. 2d 171 (Ind. S. C. 1977), *cert. denied*, 46 U.S.L.W. 3215 (Oct. 3, 1977) 16, 17, 19
Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dimissed*, 404 U.S. 1006 (1971) 27, 30, 34, 35
Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3d Cir. 1973) 21
Rosen v. Public Service Electric & Gas Co., 409 F.2d 775 (3d Cir. 1969) 60
Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) 18

Shultz v. American Can Co.—Dixie Products, 424 F.2d 356 (8th Cir. 1970) 57
Shultz v. Wheaton Glass Co., 421 F.2d 259, (3d Cir.), *cert. denied*, 398 U.S. 905 (1970) 57
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 53
South Carilan v. Katzenbach, 383 U.S. 301 (1966) 66

Usery v. Allegheny County Institution District, 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977) 67

PAGE

Usery v. Bettendorf Community School District, 423 F. Supp. 637 (S.D. Iowa 1976) 67

Ex parte Virginia, 100 U.S. 339 (1879) 66

Washington v. Davis, 426 U.S. 229 (1976) 51, 63
Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969) 18
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 35, 50

Federal Statutes

Age Discrimination Act of 1967, 29 U.S.C. §623(f)(z) 38
Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. §2000e *et seq.* .....*passim*
Equal Pay Act, 29 U.S.C. §206(d) 45, 57
Fair Labor Standards Act, 29 U.S.C. §207(e)(4) 52

Administrative Regulations and Opinions:

EEOC Decisions 61

29 C.F.R. §1604.2(a) 19
29 C.F.R. §1604.7(b) 61, 62
29 C.F.R. §1604.9(e)(f) 59, 60
29 C.F.R. §1604.31(a) 60
29 C.F.R. §800.113 51
29 C.F.R. §800.116(d) 44, 51, 52, 53, 54, 55, 57, 58, 59, 61, 62
29 C.F.R. §800.151 .....54, 55, 56, 62

30 Fed. Reg. 14927 (Dec. 2, 1965) 61, 62
33 Fed. Reg. 3344 (Feb. 24, 1968) 60
37 Fed. Reg. 6837 (April 5, 1972) 60

PAGE

Other Authorities Cited:

American Academy of Actuaries, Report on Task Force on Risk Classification (August 1977) 28

Calhoun, The Thirteenth and Fourteenth Amendment S: Constitutional Authority for Federal Legislation against Private Discrimination, 61 Minn. L. Rev. 313 (1977) 67

Hearings on Pension Problems of Older Women Before the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging, 94th Cong., 1st Sess. (1975) 23
H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971)....23, 24
H. Rep. No. 309, 88th Cong., 1st Sess. (1963) 52

James M., The Metropolitan Life: A Study in Business Growth (1947) 24, 25, 33

Nader, R., and K. Blackwell, You and Your Pension (1973) 23
Note, The Supreme Court, 1976 Term, 91 Harv. L. Rev. 241 (1977) 15, 19, 24, 28, 29

109 Cong. Rec. 8914-8916 58
109 Cong. Rec. 9206-9217 .....52, 56, 57
110 Cong. Rec. 13647 46
110 Cong. Rec. 13663-64 .....46, 48
111 Cong. Rec. 13359 46
111 Cong. Rec. 18261-18263 46

Rethorford, The Changing Sex Differential in Mortality (1975) 33

PAGE

Sands, Sutherland Statutory Construction (4th ed. 1973) 49
S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971) 23, 66
S. Rep. No. 176, 88th Cong., 1st Sess. (1963) 57, 58

U.S. Commission on Civil Rights, Staff Report, Women and Poverty (June, 1964) 23, 58
U.S. Dep't of Health, Education, and Welfare, Vital Statistics of the United States, 1973 33
U.S. Dep't of Labor, 1975 Handbook on Women Workers 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, *et al.*,

Petitioners,

—v.—

MARIE MANHART, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE

Interest of Amici*

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 200,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that confinement of women's opportunities is a pervasive problem at all levels of society, public and private, the ACLU has established a Women's Rights Project to work toward the elimination of gender-based discrimination.

---

* This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

The American Civil Liberties Union has participated in virtually every case before this Court involving interpretation of Title VII's ban on sex discrimination. The Union acted as amicus curiae in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), concerning an employer practice of refusing to hire mothers of preschool-age children; in *Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F.2d 199 (3d Cir. 1975), *vacated on juris. grounds*, 424 U.S. 737 (1976), and *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), both concerning the Title VII rights of working women disabled by pregnancy; in *Dothard* v. *Rawlinson*, 97 S.Ct. 2720 (1977), allowing a narrow exception to sex-neutral hiring standards for prison guards in Alabama's brutal maximum-security penitentiaries; and in *Nashville Gas Co.* v. *Satty*, 46 U.S.L.W. 4026 (Dec. 6, 1977), striking down an employer practice of stripping female workers returning from childbirth leaves of job-bidding seniority.

The ACLU has also participated in most of the cases before this Court challenging sex-based discrimination under the Fifth and Fourteenth Amendments. Lawyers associated with the ACLU presented the appeal in *Reed* v. *Reed*, 404 U.S. 71 (1971), participated as counsel for the appellants and later represented amicus curiae in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), represented the appellant in *Kahn* v. *Shevin*, 416 U.S. 351 (1974), the appellees in *Edwards* v. *Healy*, 421 U.S. 772 (1975), *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), petitioners in *Struck* v. *Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971, 1972), *cert. granted*, 409 U.S. 947, *judgment vacated and case remanded for consideration of mootness*, 409 U.S. 1071 (1972), and *Turner* v. *Department of Employment Security*, 423 U.S. 44 (1975),

and acted as counsel for petitioners, appellants, appellees, and amicus curiae in this Court in several other gender discrimination and women's rights cases.

American Civil Liberties Union attorneys represent the plaintiffs in *Peters* v. *Wayne State University and TIAA-CREF*, Civ. Act. No. 6-70165 (E.D. Mich.), a Title VII challenge by female academic and non-academic employees and retirees to the University's provision, through TIAA-CREF, of lower periodic retirement benefits to women than to men. Trial has commenced in the *Peters* case, and amici will refer to portions of the transcript and discovery in that case. ACLU attorneys also represent women employed by Columbia University in academic and administrative positions who have filed a charge with the Equal Employment Opportunity Commission alleging sex discrimination in the provision of pension benefits by the University through TIAA-CREF.

The American Association of University Professors (AAUP) was founded in 1915 to advance the standards, ideals and welfare of teachers and research scholars in universities and colleges. It is the oldest and largest national association of its kind. The status of women in the academic profession has been a long-standing concern of the Association. Both the Annual Meeting and the Council of the Association have voted to support sex-neutral pension plans. These actions have provided the foundation for efforts by Association officers and members, through discussion and correspondence with officers of pension funds and government officials, to seek the establishment of non-discriminatory pension plans for academic men and women. For example, in the fall of 1975, the President of the AAUP wrote to the Secretary of Labor and to the Chairman of

TIAA-CREF, the annuity association to which a very substantial proportion of all AAUP members belong, to protest TIAA-CREF's use of sex-based actuarial tables to pay women lower retirement benefits than men as "exactly the kind of discriminatory conduct which Title VII forbids." On Equal Monthly Retirement Benefits for Men and Women Faculty, 61 AAUP Bulletin 316, 317 (1975). The AAUP therefore is well qualified to address the Court in the instant case.

Petitioner employer in this case defends its former practice of paying women employees less take-home wages than similarly-situated men on the ground that, "on the average," women live longer than men. Therefore, petitioners contend, women's pensions cost more than men's, and women's take-home pay is appropriately reduced so that each woman will bear her share of the "average extra" cost of women's pensions. The question here presented is whether this explicit classification by sex is compatible with the central anticategorical thrust of Title VII of the Civil Rights Act of 1964: the right of individuals to equal treatment without regard to their membership in a particular sex, race, religious or ethnic group. The answer to this question, amici believe, is of vital significance to the efficacy of Title VII and to the achievement of full equality between the sexes.

Opinions Below

The opinions of the United States Court of Appeals for the Ninth Circuit are reported at 553 F.2d 581 (1976). The opinion of the District Court for the Central District of California is reported at 387 F. Supp. 980 (1975).

Statutes and Regulations Involved

Sections 703(a) and (h) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1974) (hereinafter "Title VII"), in pertinent part provide:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .
>
> • • • • •
>
> (h) . . . . It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) of Title 29.

Section 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §206(d) (1965) (hereinafter "Equal Pay Act") in pertinent part provides:

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than

the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Sections 1604.9(a), (b), (e), and (f) of the Equal Employment Opportunity Commission (EEOC) Sex Discrimination Guidelines, 29 C.F.R. §§1604.9(a), (b), (e), and (f) in pertinent part provide:

(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(e) It shall not be a defense under title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex.

Sections 800.116(d) and 800.151 of the Department of Labor Wage and Hour Administrator's Interpretive Bulletin on Equal Pay for Equal Work, 29 C.F.R. §§800.116(d) and 151 provide:

116(d)—If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees.

151—A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group does not qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purposes of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility.

Question Presented

Does Title VII of the 1964 Civil Rights Act prohibit an employment policy of paying all female workers less than all similarly-situated male workers, justified by the employer on the ground that "on the average" women live longer than men and therefore it costs more "on the average" to provide pension benefits to women, when: (1) the policy classifies employees on the basis of "gender as such"; (2) the great majority of women do not outlive similarly-situated men; (3) the policy runs counter to the remedial purpose of Title VII; and (4) the policy is based on insurance industry custom and is not essential to the business requirements of either the employer or insurers.

Statement of the Case

Amici incorporate the Statement of the Case set out in Brief for Respondents.

Summary of Argument

I.

Solely on the basis of their sex, women employed by petitioner Water Department received less in take-home wages than all similarly-situated men. The Water Department asserts women live longer "on the average" than men; as a result, women's pensions costs more "on the average" than men's; therefore every woman worker must be paid less in individual wages to cover part of the "average extra" cost of women's pensions. This position, focusing insistently on the "average," cannot be reconciled with the

individualistic, anti-categorical premises underlying Title VII.

The policy petitioners champion conflicts head-on with Section 703(a)'s bar to classification based on "gender as such." The conflict cannot be avoided by arguing male and female employees do not have "like qualifications." For the great majority of men and women (some 84%) share common death ages and thus are similarly situated with respect to compensation entitlement. To give 84 percent of the Water Department's female employees, women identically situated to 84 percent of the male employees, lower take-home pay is the essence of the discrimination prohibited by Section 703(a). The majority of women are penalized because a class stereotype or average, to which *most* women do not conform, is nevertheless applied to all women.

The central purpose of Title VII is to afford *individuals* equal treatment. This purpose is thwarted when the characteristics of some women are attributed to all, or when women "as a class" are compared to men "as a class." The concept of equal treatment for individuals without regard to group characteristics is incorporated in the EEOC's Guidelines, and has been applied by a number of federal courts to prohibit sex-based distinctions in retirement programs.

Finally, the policy at issue here, and the similar one of paying women lower retirement benefits, run counter to the remedial purposes of Title VII. As Congress noted, working women are economically disadvantaged compared to men; retired women are similarly disadvantaged, in large part because of prior wage and job discrimination.

To allow an additional, explicitly sex-based, lowering of either women's take-home wages or retirement benefits would heap on a further disadvantage, in conflict with the plain meaning of Section 703(a) and the grand design of Title VII.

II.

Because the policy of paying women less in take-home wages than men is unavoidably an explicit sex-based classification in *prima facie* violation of Section 703(a), the Water Department has the burden of establishing a defense.

The Water Department and the insurance amici defend the discriminatory practice at issue not on the basis of the *employer's* business requirements, but on the basis of the long-standing insurance industry practice of measuring mortality on a sex-segregated basis. This insurance custom creates neither a "business necessity" nor a Section 703(e) "bona fide occupational qualification" defense for an employer.

Without even attempting to establish any employer "business necessity," insurance amici press, solely for gender lines, the insidious argument that Title VII requires only "actuarial equality" when the relevant characteristic (here, longevity) is impossible to determine on an individual basis. Their arguments fall into four categories: cost; insurer's reliance on group-based experience; equity and risk classification; and adverse selection.

As to the only employer-related defense, cost, there is no claim that the relatively small additional cost to the Department affects its ability effectively to carry out its

function of providing water and power to the City of Los Angeles. Moreover, in light of Title VII's purpose of raising the economic status of women by eliminating discrimination in jobs and compensation, it would be perverse to justify continued lower wages or retirement benefits for women on the ground that it costs more to pay them equally with men. Compliance with Title VII was not intended to be cost-free.

Nor do any of the insurance industry arguments justify departing from the anticategorical precepts of Title VII. The insurance amici stress that insurers must use groups, and that longevity is impossible to determine by individual testing. But insurers can pool the mortality experience of men and women, just as they pool mortality experience for all other groups with different average longevity rates. For example, insurers have discontinued reliance on grouping by race, reliance once considered "dictated entirely by actuarial findings." In sum, the insurance industry cannot maintain persuasively that sound pension plans depend on sex classification, any more than they depend on race classification or classification based on a host of health and environmental factors insurers choose not to use in group insurance contexts.

Insurance amici further argue that it would be inequitable to men to pay women equal take-home pay and retirement benefits, because this would result in men subsidizing women's benefits. But group insurance would be impossible unless one class subsidized another. Moreover, in group plans, refined classification is neither necessary nor appropriate because the insurer is guaranteed a cross-section of risks. Amici have thus exaggerated the importance of equity in the group-plan context. In short, the business

purpose advanced, equity, is unconvincing as an excuse for sex classification in a group plan that uses no other classification apart from age. The related contention that elimination of sex segregation requires males to subsidize females is no more accurate than a charge that equal pension benefits for blacks and whites means blacks subsidize whites. Acceptance of the argument would stand Title VII on its head. Women could sue if they were not accorded higher life insurance benefits, blacks, if they were not accorded higher pension benefits.

Finally, the suggestion that if men are forced to subsidize women's risks, the "subsidizers" will leave the pool, occasioning the eventual collapse of insurance schemes, is based on layers of distortion and speculation, not on fact.

III.

Petitioners and supporting amici argue that the part of Section 703(h) of Title VII known as "the Bennett Amendment" provides a defense to their violation of Section 703 (a). Their argument is threefold: (1) the Bennett Amendment allows use of non-sex-based factors in setting compensation differentials, and paying women less take-home pay than men is not based on sex, but on longevity; (2) a Humphrey-Randolph colloquy indicates a Congressional intent to allow discriminatory sex-based classifications in retirement plans; (3) the Bennett Amendment makes an Equal Pay Act interpretive regulation cited in *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976), *i.e.,* 29 C.F.R. §800.116(d), controlling in Title VII discrimination cases.

All three arguments lack merit. The employer policy here is not based on a "factor other than sex"; it is based explicitly and solely on sex. The Humphrey-Randolph colloquy does not indicate a Congressional intent to allow gender lines which operate to the detriment of women workers. The interpretive regulation, by allowing sex-based differentials in wages, is contrary to the text of the Equal Pay Act and inconsistent with another Equal Pay Act regulation; indeed, the Labor Department itself retreated from the regulation by filing a brief in the Ninth Circuit urging that women are entitled under the Equal Pay Act to take-home pay equal to men's. Finally, the relevant EEOC regulations clearly prohibiting the employer practice here are entitled to deference under the Court's *Gilbert* standard.

IV.

The decision below accords with this Court's principal equal protection/gender classification decisions. Sex-averaging arguments strikingly similar to those pressed here were firmly rejected last Term in *Craig* v. *Boren,* 429 U.S. 190(1976), and *Califano* v. *Goldfarb,* 430 U.S. 199 (1977). These cases indicate that gender, like race, must not be used as a proxy for some other characteristic, attribute, or condition. To the extent Title VII calls for review more stringent than the Constitution requires, the rulings in *Craig* and *Goldfarb* make this an *a fortiori* case.

V.

Congressional authority under Section 5 of the Fourteenth Amendment and the Commerce Clause plainly supports application of Title VII's ban on sex classification to petitioner Water Department.

ARGUMENT

I.

Providing all female employees less take-home pay than all similarly-situated male employees because women "on the average" live longer than men violates Title VII of the 1964 Civil Rights Act.

A. *The Employer Policy at Issue Classifies Employees on the Basis of "Gender as Such" in Violation of Section 703(a) of Title VII.*

Solely on the basis of their sex, women employed by the Los Angeles Department of Water and Power received less in take-home wages than all similarly-situated men. The Water Department argues that women live longer "on the average" than men, that as a result women's pensions cost more "on the average" than men's pensions, and that it is therefore necessary to pay every woman worker less in individual wages in order to cover part of the "average extra" cost of women's pensions. This insistent focus on the "average" as sole justification for exclusively sex-based classification cannot be reconciled with the anticategorical premises underlying Title VII. That statute places stringent restraints on sex (or race) averaging, restraints that preclude the policy petitioner Water Department pursues.

The Water Department classifies all women employees in one group, to their economic disadvantage, and all men in another, to their economic advantage. This classification, explicitly based on "gender as such," violates Section 703 (a) of Title VII, 42 U.S.C. §2000e-2(a). *Compare Dothard* v. *Rawlinson,* 97 S.Ct. 2720 (1977), *and Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542 (1971), *with General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976).

In *Gilbert,* the Court held that a disability program dividing potential recipients into two groups—"pregnant women and nonpregnant persons"—did not classify on the basis of "gender as such." Since there was a "lack of identity" between the excluded disability (pregnancy) and "gender as such," the program did not ". . . trigger . . . the finding of an unlawful employment practice under §703(a)(1)," 42 U.S.C. §2000e-2(a)(1).[1] *Gilbert, supra,* 429 U.S. at 136. In contrast, in *Dothard,* the employer's explicit sex classification, barring women from applying for a job open to men, triggered the Section 703(a) unlawful employment practice finding, a finding surmountable by the employer only upon establishing justification pursuant to the Section 703(e) BFOQ defense. As explained in *Phillips*:

> Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having preschool-age children.

Phillips, supra, 400 U.S. at 544.[2] The Water Department and its supporting amici seek to escape the Section 703(a) requirement by arguing, in essence, that male and female

---

[1] Unlike pregnancy, long life or short is hardly an *additional* risk unique to women, relating to "their differing role in 'the scheme of human existence.'" *General Electric Co.* v. *Gilbert, supra,* 429 U.S. at 129 n.17. Rather, the issue here is appropriate treatment of a risk common to all human beings. *See* Note, 91 Harv. L. Rev. 241, 248-50 (1977).

[2] The notion pressed by petitioners (Brief at 19, 39) and amici TIAA-CREF (Brief at 11, 15) that a "rational basis" for sex (or race) classification is all a Title VII defendant need establish is remarkable in light of the Court's clear rulings to the contrary. No one contended in *Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542 (1971), for example, that the sex classification was "irrational."

(footnote continued on following page)

employees do not have "like qualifications" for equal take-home pay because "women outlive men." Petitioners' Brief at 4.

Petitioners' argument dissembles. As the district court noted in *Henderson* v. *Oregon,* 405 F. Supp. 1271, 1275 n. 5 (D. Ore. 1975), *appeal docketed,* No. 76-1706 (9th Cir. March 30, 1976):

> The great majority of men and women—84 percent—share common death ages. That is, for every woman who dies at 81 there is a corresponding man who dies at 81. The remaining 16 percent are women who live longer than the majority and men who live shorter. As a result, each woman is penalized because a few women live longer and each man benefits because a few men die earlier.

Accord, Reilly v. *Robertson,* 360 N.E.2d 171 (Ind. S.C. 1977), *cert. denied,* 46 U.S.L.W. 3215 (Oct. 3, 1977); *Manhart* v. *City of Los Angeles,* 553 F.2d 581, 585 (9th Cir. 1977), *cert. granted,* 46 U.S.L.W. 3214 (Oct. 3, 1977).[3]

Quite the opposite. The United States, as amicus curiae, clarified at oral argument:

> We do not contend [a decision not to employ women who have children of preschool age] is irrational; we contend that it's illegal.
>
> . . .
>
> Many things that are illegal [under Title VII] may not be irrational.

Transcript of Oral Argument, December 9, 1970. *Accord, Dothard* v. *Rawlinson,* 97 S.Ct. 2720 (1977). Only slightly less remarkable is the failure of petitioners and their amici to notice that even under the constitutional standard, considerably more than rationality must be established to justify resort to gender as a classifying factor. *See Craig* v. *Boren,* 429 U.S. 190, 197 (1976); *Califano* v. *Goldfarb,* 430 U.S. 199, 209 n.8 (1977).

[3] In *Peters* v. *Wayne State University and TIAA-CREF,* Civ. Act. No. 6-70165 (E.D. Mich.), currently on trial, plaintiffs presented an expert, Dr. Gerald Martin, who had previously testified as an expert in *Reilly* v. *Robertson, supra.* He testified that he had examined the mortality tables used by TIAA-CREF, and had calculated the percentage of men and women sharing common death ages under these tables. Under the first set, he found an overlap of 79.5%; under the second, he found an overlap of 80.1%. Trial Transcript at 213 (Sept. 29, 1977).

The "great majority of men and women," the 84 percent who share common death ages, indisputably have "like qualifications"; as to compensation entitlement, they are similarly situated. Yet the great majority of women who do not outlive similarly-situated men are paid less because a relatively small number of women will live longer and a relatively small number of men will die earlier. To give 84 percent of all the Department's female employees, women identically situated to 84 percent of the male employees, lower daily and lifetime wages is the essence of the discrimination prohibited by Section 703(a). One factor, and one factor alone, differentiates the two groups: their sex. The women will work the same jobs, for the same number of years, and die at the same time after retirement as their male counterparts. Their economic needs will be no less than those of their male co-workers. Yet their take-home wages will be less, solely because they are women.

Thus, the majority of women are penalized because a class stereotype or average, one to which *most* women do not conform, is nevertheless applied to all women. "[I]t is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes." *Dothard* v. *Rawlinson, supra,* 97 S.Ct. at 2729.[4] It is similarly impermissible under

---

[4] Stereotypes may accurately portray the *average* characteristics of women or men. For example, it is true that women on the average cannot lift as much weight as men on the average; yet courts

Title VII to pay an individual woman lower take-home wages than a similarly-situated man on the basis of a stereotype or average that inaccurately describes some 84 percent of the affected population.

The Water Department's insistence on comparing the class of women employees to the class of men employees misses the central thrust of Title VII: the right of *individuals* to equal treatment without regard to their class membership in a particular sex, race, religious, or ethnic group.[5] The EEOC has consistently taken this position in its guidelines regarding the BFOQ defense:

---

have invalidated employer practices based on such statistically-valid averages because they penalize the individual woman or man who does not conform to the group average. *See Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). Indeed, by definition, most people will not conform to an average. Sex (and race) stereotypes have been assailed under Title VII, not because they represent invalid statistical averages, but because they injure individuals who do not conform to them yet are treated as though they do.

[5] The Water Department and supporting amici contend that, in the insurance context, they may measure whether equality of treatment exists on the basis of what each sex-based group as a whole receives, rather than on the basis of what identically-situated individual men and women receive, citing *Gilbert* for this proposition. This argument entirely misconstrues *Gilbert*, as the Court's subsequent decision in *Nashville Gas Co.* v. *Satty*, 46 U.S.L.W. 4026 (Dec. 6, 1977), makes clear. In both cases, the Court was examining the possible discriminatory effect of a *neutral* policy, and of course had to resort to statistics on group impact in order to determine whether the policy in fact operated to discriminate on the basis of sex. Here, however, the policy is explicitly based on sex. Hence, group impact analysis is obviously inappropriate. The gender-based classification triggers a finding of a Section 703(a) violation, casting a burden of justification on the employer. *Dothard* v. *Rawlinson, supra; Phillips* v. *Martin Marietta Corp., supra.* Moreover, petitioners and amici should have paid closer attention to the text of the *Gilbert* opinion where coverage of the

> The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

29 C.F.R. §1604.2(a)(1)(ii).[6] As a consistent position of the EEOC, this guideline is entitled to weight; indeed, just last Term, the Court so held with respect to the full text of Section 1604.2(a).[7] *Dothard* v. *Rawlinson, supra,* 97 S. Ct. at 2729 n.19.

Nor is the concept of equal treatment for individuals without regard to group characteristics a new one in the retirement context. A number of federal courts have held Title VII prohibits sex-based distinction in retirement programs. In *Henderson* v. *Oregon,* 405 F. Supp. 1271 (D. Ore. 1975), *appeal docketed,* No. 76-1706 (9th Cir. March 30, 1976), Judge Praegerson invalidated a variant of the Water Department's retirement system—the payment of lower monthly retirement benefits to women. That ruling was made in the face of precisely the same "average longevity" argument advanced here.[8] *See also Reilly* v. *Robertson,*

---

same breadth for analogous risks is indicated as the Title VII requirement. *Compare* TIAA-CREF Brief at 21, *with* Note, 91 Harv. L. Rev. 241, 248-50 (1977).

[6] Formerly numbered 29 C.F.R. §1604.1(a)(1)(ii), 30 Fed. Reg. 14927 (Dec. 2, 1965).

[7] Of course, the BFOQ defense is not available here. *See* I.B., *infra.*

[8] Two conflicting post-*Gilbert* district court decisions have issued on the legality of an "unequal benefits" retirement scheme similar to the one in *Henderson*: the program provided by TIAA-CREF (amici here) to numerous colleges and universities. *Peters* v. *Wayne State University and TIAA-CREF*, Civ. Act. No. 6-70165 (E.D. Mich. Sept. 21, 1977); *EEOC* v. *Colby College and TIAA-CREF*, 15 FEP Cases 1363 (D. Me. Nov. 17, 1977). In both cases, TIAA-CREF moved for summary judgment based upon this Court's

supra (lower monthly benefits for female retirees violates equal protection guarantees of the Indiana and Federal Constitutions).

Similarly, retirement programs that pay lower monthly benefits to male early-retirees have been found unlawful under Title VII.[9] *Chastang* v. *Flynn & Emrich Co.*, 541

Gilbert decision. Judge DeMascio denied the motion in *Peters*. Two months later, in *Colby College*, Judge Gignoux granted the motion. The *Colby College* decision, which relies exclusively on *Gilbert*, fails to note a critical distinction this Court has underscored: the *Gilbert* classification was "not gender-based" at all; the retirement classification at issue in *Colby* divided workers on the basis of "gender as such."

The *Peters* decision is attached hereto as an Appendix. The TIAA-CREF amici brief includes an addendum setting out the *Colby* decision, but fails to mention *Peters*.

[9] This practice also drew support from the use of sex-segregated mortality tables, although that fact is not discussed in the decisions. Retirement at age 65 is considered the "norm" and early-retiring employees are given the "actuarial equivalent" of normal retirement, based on sex-segregated mortality tables. For example, if an identically-situated male and female were to retire at age 65 with a yearly retirement benefit of $5,000, the respective present actuarial values of their benefits, based on sex-segregated mortality tables predicting 18 more years of life for the average man, and 22 for the average woman, would be $90,000 for the man ($5,000 × 18 = $90,000), and $110,000 for the woman ($5,000 × 22 = $110,000). The actuarial equivalent for early retirement for each at age 62, still based on sex-segregated mortality tables, would then be $4,285 for the man ($90,000 ÷ 21 [18 + 3] = $4,285), and $4,400 for the woman ($110,000 ÷ 25 [22 + 3] = $4,400).

If a merged mortality table were used for both sexes, as is currently done for such groups as blacks and whites, or smokers and nonsmokers, the present actuarial value of the man's and woman's retirement at age 65 would be equal (*i.e.*, $5,000 × 20 years = $100,000), and similarly, the actuarial equivalent for early retirement at age 62 would yield equal payments ($100,000 ÷ 23 = $4,348). (The above description is for demonstration purposes only and omits the role of interest in calculating present value.)

Many pension plans in current use in fact do not use sex-segregated mortality tables to establish sex-differentiated benefit levels. *See* Brief for the Society of Actuaries at 12-13, 15-16.

F.2d 1040 (4th Cir. 1976); *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90 (3d Cir. 1973); *Fitzpatrick* v. *Bitzer*, 390 F. Supp. 278 (D. Conn. 1974), *appealed on other grounds*, 427 U.S. 445 (1976). Further, programs requiring women to retire earlier than men, or blacks earlier than whites, have not survived Title VII challenge. *Peters* v. *Missouri Pacific R.R.*, 483 F.2d 490 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973) (race); *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971) (sex); *Fillinger* v. *East Ohio Gas Co.*, 4 FEP Cases 73 (N.D. Ohio 1971) (sex); *cf. Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90, 93, 96 n.11 (3d Cir. 1973) (sex).[10]

The Title VII holdings in these cases are based upon the statute's unambiguous prohibitions. Title VII forbids employers

> . . . to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex . . . . [Emphasis added]

Section 703(a)(1), 42 U.S.C. §2000e-2(a)(1).[11] As the Ninth Circuit held in this case, 553 F.2d at 593:

> A greater amount is deducted from the wages of every woman employee than from the wages of every man

[10] *Cf. Califano* v. *Webster*, 97 S.Ct. 1192 (1977) (indicating recognition by Congress and this Court of the devastating impact on women of early retirement policies applied more frequently to females than to males).

[11] *See also* Section 703(a)(2), which further forbids an employer "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . ." 42 U.S.C. §2000e-2(a)(2).

> employee whose rate of pay is the same. How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a whole, longevity, and it disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that this difference is not based on sex is to play with words.

Similarly focusing on Title VII's anticategorical premises, the Seventh Circuit ruled:

> A plain reading of the statute indicates that retirement plans which treat men and women differently with respect to their ages of retirement are prohibited .... Moreover, the classification of employees on the basis of sex is, of itself, contrary to the intent of Title VII.

Bartmess, supra, 444 F.2d at 1189. *See also Fillinger, supra,* 4 FEP Cases at 74.

Finally, the policy at issue here and the similar policy of paying women lower retirement benefits run counter to the remedial purposes of Title VII. As the House Committee on Education and Labor wrote in explaining the necessity for the 1972 amendments, which extended Title VII to state and local governments:

> The situation of the working woman is no less serious [than that of minorities]....
>
> Recent statistics released from the U.S. Department of Labor indicate that there exists a profound economic discrimination against women workers. Ten years ago, women made 60.8% of the average salaries made by men in the same year; in 1968, women's earnings still only represented 58.2% of the salaries made by men in that year. Similarly, in that same year, 60% of

> women, but only 20% of men earned less than $5,000. At the other end of the scale, only 3% of women, but 28% of men had earnings of $10,000 or more.

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 4-5 (1971). *See also* S. Rep. No. 92-415, 92d Cong., 1st Sess. 7-8 (1971)[12] Retired women are similarly disadvantaged compared to retired men, in large part because of prior wage and job discrimination.[13] Indeed, the status of being an elderly woman correlates strongly with poverty. Women and Poverty (Staff Report, United States Commission on Civil Rights, June 1964) at 9. As the Civil Rights Commission explained:

> "Older" women (age 65 and over) receive the lowest median annual income of any age or sex group; this income of $1,899 is approximately half the amount received by men in the same age group ($3,476).[14]

---

[12] The gap between the median incomes of full-time, year round men and women workers had further widened by 1973, when women's income fell to 57% of men's income. U.S. Dep't of Labor, 1975 Handbook on Women Workers 129-30.

[13] One governmental study, Women and Poverty (Staff Report, United States Commission on Civil Rights, June 1974) cited statistics showing a median benefit under private pension plans of $970 per year for women, compared to $2,080 per year for men. *Id.* at 43, citing R. Nader and K. Blackwell, You and Your Pension 14 (1973). Similarly, evidence in the *Peters* case, note 8 *supra*, indicates that men on the average receive far higher TIAA-CREF retirement benefits than women on the average. For example, in 1976, men and women received the following respective average yearly payments from TIAA: 1) $1,553 and $1,044, for the single life option; 2) $2,731 and $876, for the 2/3 benefit to survivor option, with second annuitant living; 3) $1,852 and $845, for the full benefit to survivor option, with second annuitant living; and 4) $2,619 and $1,318, for the 1/2 benefit to second annuitant option, with second annuitant living. TIAA-CREF's Supplemental Answers to Plaintiffs' Interrogatories 5-7.

[14] For the plight of older women, *see generally* Hearings on Pension Problems of Older Women, Before the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging, 94th Cong., 1st Sess. (1975).

To allow an additional, explicitly sex-based, lowering of either women's take-home wages or retirement benefits would heap on a further disadvantage, in conflict with the plain meaning of Section 703(a) and the grand design of Title VII. As the House Committee said:

> In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination against women continues to be widespread, *and is regarded by many as either morally or physiologically justifiable.*
>
> This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination. [Emphasis added]

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 4-5 (1971). Clearly, the Water Department and the insurance industry do think lower take-home wages and retirement benefits for women workers are "morally [and] physiologically justifiable."[15] But Congress has decreed that such practices must cease.

---

[15] A similar belief was once in vogue with respect to race. *See* M. James, The Metropolitan Life: A Study in Business Growth 338-39 (1947) (higher life insurance rates for blacks are "dictated entirely by actuarial findings" and are therefore not race discrimination). As to "psychological justification," recent commentary (Note, 91 Harv. L. Rev. 241, 249 n.43 (1977)) observes:

> Title VII was intended to end employment discrimination and counteract social forces that shaped the divergent life patterns of protected and nonprotected classes. It is conceivable that the statistical experience on which gender-specific life expectancy tables are based was shaped by the work patterns of a society in which women had relatively little access to key jobs. The viability of the prediction that women will live longer than men in a world without employment discrimination could itself be open to question. *See* Lewis & Lewis, The Potential Impact of Sexual Equality on Health, 297 New England J. Med. 863 (1977).

Compare the grudging acknowledgement of this point in Brief for the Society of Actuaries at B-4.

In sum, the Water Department's policy of paying women, the vast majority of whom are identically-situated to their male co-workers, less in take-home wages, is unavoidably an explicit sex-based classification in *prima facie* violation of Section 703(a). Once plaintiffs have established a *prima facie* case, the burden shifts to the employer to rebut that case. We therefore turn to the question whether the Water Department has established a defense to its *prima facie* violation of the statute.

B. *The Traditional Insurance Custom of Computing Mortality Rates on a Sex-Segregated Basis Does Not Constitute a Defense to an Employer Policy of Overtly Discriminating Against Female Employees by According Them Either Lower Take-Home Pay or Lower Retirement Benefits Than Identically-Situated Male Employees.*

Both the Water Department and its supporting amici defend the discriminatory employment practice at issue not on the basis of the *employer's* business requirements, but on the basis of long-standing practice in the insurance industry—measuring mortality on a sex-segregated (though not on a race-segregated)[16] basis.[17] This insurance custom

---

[16] *But see* M. James, The Metropolitan Life: A Study in Business Growth 338 (1947) (higher life insurance rates for blacks, once the custom, were justified as "dictated entirely by actuarial findings").

[17] The Department itself does not purchase its retirement program through an outside insurance company, but has instead set

creates neither a business necessity nor a BFOQ defense for an employer.[18]

The BFOQ defense specified in Section 703(e), 42 U.S.C. §2000e-2(e), by its very terms is not available as justification for a discriminatory compensation practice. Section 703(e) provides a narrow exception to Title VII liability for certain discriminatory hiring and employing practices. *See Dothard* v. *Rawlinson, supra.* It does not reach the range of other practices encompassed by Section 703(a)—sex-based discharge, compensation differentials, and distinctions in terms, conditions or privileges of employment.[19]

The business necessity defense, while generally available in cases challenging a neutral policy with a discriminatory impact, was not developed as a justification for explicit race or gender lines. *See* this Court's discussions of "business necessity" as a defense to the neutral height and weight rule, and BFOQ as a defense to the facial bar to women's employment in *Dothard* v. *Rawlinson, supra,* 97 S. Ct. at 2728 n.14, 2729. Although these defenses are different, a common thread unites them. To prevail once a *prima facie*

---

up its own pension plan, operated by a Board of Administration, pursuant to the City Charter's mandate. Charter of the City of Los Angeles §220.1. The Department nevertheless bases its arguments upon the insurance industry's traditional use of sex-segregated mortality tables.

[18] The Department does not formally assert either a business necessity or a Section 703(e) BFOQ defense, but since the concerns of petitioners and their supporting amici should be tested by the developed law on these defenses, we address both issues here.

[19] Section 703(a) also prohibits any limitation, segregation, or classification which deprives any individual of employment opportunities or adversely affects his or her status as an employee because of such individual's sex.

violation of Title VII has been shown, the employer must establish that the challenged policy is job-related and essential to the safe and efficient operation of the employer's business. As this Court reiterated in *Dothard, supra,* 97 S. Ct. at 2728 n. 14:

> [F]or both private and public employers, "The touchstone is business necessity," Griggs, 401 U.S. at 431; a discriminatory practice must be shown to be *necessary to safe and efficient job performance* to survive a Title VII challenge. [Emphasis added]

The *Dothard* opinion quoted approvingly from a Fifth Circuit BFOQ formulation:

> [D]iscrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively. [Emphasis in original]

Diaz v. *Pan American World Airways,* 442 F.2d 385, 388 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971). The Fourth Circuit further elaborated as to the business necessity test:

> [T]he business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with lesser differential racial impact.

Robinson v. *Lorillard Corp.,* 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971).

The justifications for the gender line at issue advanced by the Water Department and supporting amici fail completely to meet these standards. Reluctant to alter accustomed ways, amici press an insidious argument. "Actuarial equality," [20] they urge, is all that Title VII requires when the relevant characteristic (here, longevity) is impossible to determine on an individual basis. If this is a "neutral" argument, *i.e.*, not reserved for sex classifications, then of course it would apply as well to a plan providing minority group members "with less daily sick pay because of a statistically higher rate of illness among members of that minority." Note, 91 Harv. L. Rev. 241, 250 (1977). But at this point, amici actuaries retreat. "[C]ertain classifications," they assert, although

> perfectly feasible from an actuarial standpoint may be barred for other reasons of social policy. For example, black persons exhibits shorter longevity than white persons, but they are not charged a lower amount when they purchase annuities or a higher amount when they purchase life insurance.

Brief for the Society of Actuaries at 11.[21] In short, the purportedly neutral principle is pressed solely for gender

[20] The concept "actuarial equality" begs the question. Whether or not two unequal pensions are considered actuarially equal (or two equal pensions are considered actuarially unequal, *see* Petitioners' Brief at 5), depends on whether or not sex-segregated (or race-segregated, or smoker-segregated) mortality tables are used. If segregated tables are used, unequal periodic benefits will be actuarially equal; if merged tables are used (as for blacks and whites, or smokers and nonsmokers), unequal periodic benefits will be actuarially unequal. *See* note 9 *supra.*

[21] A Report by a Task Force on Risk Classification of the American Academy of Actuaries states: "Race is not now determined as a composition factor of the group because of its social unacceptability . . . ." Report on Academy Task Force on Risk Classification 15 (August, 1977).

lines.[22] But the "social policy" in point, embodied in Title VII, requires that "analogous risks be spread among the entire work force," without regard to the race, national origin or sex of employees. Note, *supra,* 91 Harv. L. Rev. at 248-50 (pointing out that *Gilbert* provides no shield for the sex segregation petitioners and amici champion).

The employer and insurance industry pleas to substitute "actuarial equality" for Title VII's anticategorical premises fall into four general categories: cost; insurers' reliance on group-based experience; equity and risk classification; and adverse selection.

1. The Employer Defense: Cost.

Petitioners and amici assert employer costs will rise if women are accorded both equal take-home pay and equal retirement benefits. Compliance with Title VII, however, was not intended to be cost-free.

Notably, the Water Department has been providing equal take-home pay since January 1, 1975, pursuant to a new state law. Cal. Gov. Code §7500 (West, 1977). The Department does not argue that the small additional cost compliance with the law entails affects its ability to provide water and power, safely and efficiently, to the City of Los Angeles. Current experience thus demonstrates that the Department's policy of lower take-home pay for women was in no way "necessary to safe and efficient" operations. *Dothard,*

[22] Nor is this the only point on which the actuaries' "neutrality" is open to question. While their brief (at 30) counsels against disturbing long-standing custom, it is clear even from their slanted presentation that retirement plans giving equal benefits to men and women are widely used, evidently without untoward effect. *See* Brief for the Society of Actuaries at 12-13, 15-16.

supra. Nor did that policy touch the "essence of the [Department's] business." *Diaz, supra*.

It is true, of course, that effective implementation of equal employment guarantees will frequently result in added costs to the employer. *See, e.g., Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974) (requiring employer to raise day shift women's wages to the level paid to men hired to work the night shift); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975) (requiring full back pay to achieve "the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination"); *Robinson* v. *Lorillard Corp., supra*, 444 F.2d at 799 n.8, 800 (holding "dollar cost alone," or "avoidance of the expense of changing employment practices is not a business purpose that will validate . . . an otherwise unlawful employment practice").

The Department's current provision of equal take-home pay to women effectively answers the insurance industry amici prophecies of unbearable expense unless the Court sanctions a departure from Title VII's central command. The asserted billions (Brief of American Council of Life Insurance at 3, 43, 47) are not based on evidence in any case. Significantly, no insurance industry brief points to a prohibitive cost for the Water Department itself. Moreover, the evidence in another pension-plan case currently on trial, *Peters* v. *Wayne State University and TIAA-CREF*, Civ. Act. No. 6-70165 (E.D. Mich.),[33] indicates that the actual costs of dropping the gender line are minus-

[33] The District Court denied defendants TIAA-CREF's motion for summary judgment on September 21, 1977. *See* note 8 *supra*.

cule for a particular employer—less than ⅓ of 1% of the employer's gross payroll budget."

Finally, it is the purpose of Title VII to raise the economic status of women and minorities by eliminating pervasive employment discrimination in both jobs and compensation. In light of this purpose, it would be perverse to justify continued lower wages or retirement benefits for women on the ground that it costs more to pay them equally with men. Thus, the sole business purpose advanced on behalf of employers—avoidance of added costs—surely does not establish a business necessity defense in this case.

2. Insurance Industry Objections.

The remaining arguments advanced—insurers' reliance on group-based experience, equity and risk classification, and adverse selection—are not employer business purposes. Rather, they concern the operations of insurers with whom employers contract to provide fringe benefits to their employees. Cost apart,[35] they do not impact on the

[34] In discovery, defendants TIAA-CREF stated:

> The University was advised on September 10, 1975 that it would cost an estimated $188,000 additionally per year in order to pay women the same monthly benefits as now received by the men based upon the contributions by and on behalf of the women in the retirement program at Wayne State for the year 1974-75.

TIAA-CREF's Answer to Plaintiffs' Interrogatory 33. Defendant Wayne State University stated that its gross payroll budget for 1974-1975 was $84,306,283.08. Wayne State University's Answer to Plaintiffs' Interrogatory 2. $84,306,000 ÷ 188,000 = .0022, or .2%.

[35] Added cost to the employer is only short-term—the cost required to raise benefits of women to the level of *vested* benefits men employees will be entitled to receive. In the long run, compliance with Title VII will be achieved by pooling the mortality

employer's business. Therefore they do not qualify as *employer* defenses. In addition, there is no record in this case, which was decided by summary judgment, as to whether any of the insurance industry concerns are even factually based. Nevertheless, since they play such a prominent role in the insurance industry briefs, they will be addressed here.

a. *Insurers' Reliance on Group-Based Experience*

The insurance industry's prime argument is that insurers must use groups, and in particular, sex-based groups. The central purpose of Title VII, all concede, is equal treatment for individuals. But amici stress that longevity is impossible to determine by individual testing and that insurers must use the statistical experience of large groups to determine rates and benefit structures. This is true, but irrelevant to the issue before the Court.

Respondents, of course, do not seek individual predictions of longevity. Rather, they claim that individual men and women working the same job, for the same number of years, and retiring at the same date, are entitled to receive equal take-home wages and pension benefits. Respondents contend that insurers can accommodate by pooling the mortality experience of men and women, *just as mortality experience is pooled for all other groups with different average longevity rates.* Such groups include, for example,

---

experience of men and women just as the mortality experience of blacks and whites, smokers and nonsmokers, those with high blood pressure and those with normal pressure, obese and thin, are currently pooled. This pooling would raise the benefit level for women and lower it somewhat for men, as is currently the case for all other groups with different mortality rates.

black[34] and whites, smokers and nonsmokers,[35] persons with high blood pressure and those with normal blood pressure, the obese and the thin, persons with a family history of short longevity and those with long-lived families. Pooling would enable insurance companies to charge the same premiums and pay the same benefits to men and women, just as they do now for blacks and whites, or smokers and nonsmokers.

Significantly, such accommodation is not new to the industry. Insurers have discontinued reliance on grouping by race, once considered "dictated entirely by actuarial findings." M. James, The Metropolitan Life: A Study in

---

[34] In 1973, whites in the United States had an estimated average length of life of 72.2 years, non-whites, 65.9 years. U.S. Dep't of Health, Education, and Welfare, Vital Statistics of the United States, 1973, Volume II-Section 5, Life Tables, Table 5-5.

[35] A recent study, conducted at the University of California at Berkeley, of the reasons for the gap between the average mortality experience of men and women found that men's higher smoking rate accounted for about half the gap. Rethorford, The Changing Sex Differential in Mortality 104 (1975):

> A detailed analysis of the impact of tobacco smoking trends on the SMD [sex mortality differential] is possible only for the United States based on American Cancer Society data specific for sex, age, smoking status, and ICD [International Classification of Diseases] cause of death. Analysis shows that smoking accounted for 47 percent of the female-male difference in $_{50}e_{37}$ (life expectancy between 37 and 87, the age range of the ACS data) in 1962, and about 75 percent of the increase in the female-male difference in $_{50}e_{37}$ between 1910 and 1962.

Another recent study of the effect of cigarette smoking on longevity concluded that not only do nonsmokers generally live longer than smokers (by a difference of more than ten years), but that women who smoke cigarettes on the average live six years less than men who smoke cigarettes. Northeastern Pennsylvania Study on Smoking and Health, Journal of Breathing (Illinois Lung Association), June 1975.

Business Growth 338-39 (1947).[28] In time, the same acknowledgement may be expected with respect to sex classification.

Plainly, the insurance industry's insistence on the need to segregate by sex[29] fails the *Robinson* test, quoted *supra* at p. 27. There is an available "acceptable alternative policy . . . which would accomplish [the business purpose advanced] equally well with a lesser differential . . . impact

[28] Inexplicably, amici TIAA-CREF appear to claim they are "not aware" of this history. Brief at 6.

[29] Discovery and evidence in *Peters* v. *Wayne State University and TIAA-CREF*, Civ. Act. No. 6-70165, now on trial in the Eastern District of Michigan, suggest that pooling of men's and women's experience to set rates and benefits is far easier than is suggested by the insurance industry amici briefs. For example, plaintiffs in *Peters* presented evidence showing that Wayne State's group life insurance plan, procured through Massachusetts Mutual Life Insurance Company, charged Wayne State a flat rate of 61 cents per thousand dollars of coverage per month per employee, and paid benefits without distinction based on sex. Trial Transcript at 683-84 (Oct. 7, 1977). This flat rate covered both the basic $5,000 of coverage given all employees on a noncontributory basis, and the supplemental insurance of one or two times an employee's annual salary, provided on a contributory basis. The employees' contribution for the supplemental insurance varied depending on age, but not on sex. *Id.* at 678-682. Thus, in life insurance, women and the employer are charged equal rates and women receive equal benefits; of course, in this instance, pooling works in men's favor, since life insurance rates would be lower for women, or benefits would be higher, if sex-segregated mortality tables were used.

In addition, TIAA-CREF acknowledged that it is technically possible to establish a retirement program which does not differentiate in either contributions or periodic benefits on the basis of sex. TIAA-CREF Answer to Plaintiffs' Interrogatory 48. Finally, Mr. Arthur Anderson, an actuarial witness called by plaintiffs, testified that it would be possible for TIAA-CREF to continue to provide a defined contribution plan without differentiating in benefits on the basis of sex, and that doing so would not affect their solvency; ". . . it would mean they'd have to set different premium rates, but they could be uniform for both sexes." Trial Transcript at 70 (Sept. 28, 1977).

[on women]." *Robinson, supra,* 444 F.2d at 798. That policy: pooling the experience of men and women, as is done for other groups with different average longevity. Nor is the alternative untried. Many plans now in existence provide contribution rates and benefits based on such pooling. *See, e.g.*, the sex-neutral rate and benefit schedule of the Metropolitan Mutual Life Insurance Company discussed in note 29 *supra*, and the actuaries' acknowledgement that options under defined-benefit plans which are commonly sex-differentiated can be and have been made sex-neutral. Actuaries Brief at 15-16. Under these plans, the same contribution is made for a man and a woman, and sex does not determine the benefits due an employee.[30] Moreover, it should be stressed that respondents do not in fact challenge the insurance industry's need to use groups, but seek rather to *extend* group concepts. Abandoning the particular classification at issue does not require switching to "individualized" predictions of longevity; it simply expands the group insurers use.

In sum, the insurance industry cannot maintain persuasively that sound pension plans depend on sex classification, any more than they depend on race classification or classification based on a host of health and environmental factors insurers choose not to use in group insurance contexts.

[30] "Unisex," far from offending any constitutional principle as amici TIAA-CREF would have it (Brief at 24-25), is precisely what the judgments in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), yielded. Monthly benefits to widower Leon Goldfarb were not a penny larger than those a widow received. In fact, what *Wiesenfeld* and *Goldfarb* prohibited, amici urge here: use of gender as a proxy for another trait or characteristic.

b. *Equity and Risk Classification*

Equity is a central insurance concept, and sex classification is necessary to achieve it, insurers assert. Equity is defined as determining the proper risk classification for persons, and either charging them premiums or paying them benefits on the basis of their classification. Further, petitioners and supporting amici claim it would be inequitable specifically to men to pay women equal take-home pay and equal retirement benefits. Since "women outlive men," petitioners and their amici maintain equality would in fact result in men subsidizing women's benefits. The flaw in this argument is apparent: group insurance would be impossible unless one class subsidized another.

In contrast to individual insurance, where equity considerations are of prime importance, *group* insurance plans do not essay particularized risk classification for participants. Rather, they pool risks broadly. With respect to individual policies, insurers must assess closely a policy applicant's chance of living or dying in order to avoid individuals self-selecting a particular product with adverse consequences to the insurer. For example, if persons with extremely good health (long-lived persons, on the average) were the only ones to buy individual annuities with premiums and benefits based on average health characteristics of the population as a whole (average-lived persons), the insurer would suffer loss in the long term. To protect against this eventuality, the insurer carefully evaluates each individual's health and occupation, taking into account a large number of risk-indicating factors, so as to make as accurate a risk classification as is feasible.

But in group plans, such individualized treatment is neither necessary nor appropriate. Participants do not have the right to select the product. Therefore, a range of risks is guaranteed to the insurer. As actuary Arthur Anderson testified in the *Peters* case, note 8 *supra*:

> In a group situation . . . you look at the group as a whole and the product is characterized by the fact that you get to cover all of the group. You do not have the right of refusing anyone of the group, typically, and you generally get them all so that they can't pick and choose you and the risks can't select you and the product is uniform and generally has a standard premium rate of some sort. And the idea of doing that is that you avoid the expense of individually examining each person to determine his own prospects for life or death in return for getting a decent cross-section of everyone, and in that cross-section, if you can make sure you get them all, you can be sure of getting some good risks and some bad risks and some so-so risks all together and getting a nice distribution and avoid any selection by people who are buying the insurance.
>
> The idea, if I may go further, the idea, too, in a group insurance is for all these people in the group, within the group to pool the risk as a group, whereas in individual insurance . . . the idea is to pool the risk within your own little class.

Trial Transcript at 58-59 (Sept. 28, 1977). Thus, most *group* plans do not use a range of classifying factors—such as smoking versus nonsmoking, fat versus thin, high blood pressure versus normal blood pressure—to place each person in his or her "own little class." Instead, group plans routinely use only age,[31] and, less pervasively, sex.[32]

---

[31] Age as a classification, of course, is not under attack in this lawsuit, although the amici briefs supporting petitioners sometimes treat age and sex classifications as though they were inex-

Thus, the importance of equity in the group plan context has been exaggerated by amici supporting petitioners. Employees generally have the right to join only the particular plan the employer offers, and frequently are required to join the plan as a condition of employment. Even where participation is theoretically voluntary, forgoing participation normally means forfeiting a very substantial employer contribution, contrary to the employee's economic self-interest.[33] In short, the business purpose advanced here by the insurance industry—equity—is unconvincing as an excuse for sex classification in a *group* plan that uses no other classification apart from age.

---

tricably linked. By contrast, Congress specifically treated the two classifications differently: Congress expressly exempted retirement plans from the reach of the Age Discrimination Act (29 U.S.C. §623(f)(2)); it adopted no such exemption to Title VII.

Moreover, there is a critical difference between age and sex as a basis for classification. One's age inevitably changes; one's sex, like one's race, does not. This points up a fatal flaw in the age overlap theory TIAA-CREF submit to rebut the sex overlap of 84%. If a woman aged 60 is identically situated (*i.e.*, same job, salary, number of years worked, and amount in her retirement account) to a woman aged 65, except for her age, she merely need wait until 65 to retire in order to get the same benefit as the currently 65 year old woman. (If, on the other hand, she is not identically situated with the 65 year old (*i.e.*, she has worked 5 fewer years and has 5 fewer years of employer contributions in her retirement account), it is not discrimination to pay her lower benefits upon retirement at age 60 than to the woman retiring at age 65.)

In contrast, a woman who is identically situated to a man can never become a man and collect the same take-home wages or benefits that he receives.

[32] Many do not use sex. *See* text at note 30 *supra*.

[33] In Wayne State's TIAA-CREF pension plan, for example, the University contributes 10% of the employee's salary, but the employee has no right to that 10% of salary if he or she waives participation.

The related argument that equal take-home pay and equal benefits would unfairly penalize men by forcing them to subsidize women is similarly inapposite. For the contention that elimination of sex segregation requires males to subsidize females is no more accurate than a charge that failure to segregate by race means blacks subsidize whites. In fact, the short-lived (a class which includes many women) subsidize the long-lived (a class which includes many men). Subsidizing of that kind is the key feature of group insurance. Moreover, as demonstrated in I. A. *supra*, the correlation between sex and length of life is, at best, highly imprecise.

Ironically, if the "equity" argument prevailed, it would follow logically that blacks—with their shorter average longevity—would have a Title VII claim against any employer giving them equal retirement benefits, a claim grounded on the theory that they are subsidizing whites.[34] The relief sought would be to award blacks higher retirement benefits than whites. Whites would have a claim where life insurance benefits are no higher for them than for blacks, women, a similar claim when life insurance proceeds are the same for males and females. Surely claims so founded would stand on its head Title VII's anti-categorical approach.

c. *Adverse Selection*

Spinning out the group-based experience and equity objections, TIAA-CREF suggest that if individuals (pre-

---

[34] Any ethnic group that could establish a shorter average longevity experience than other ethnic groups would have a similar claim. *Cf. Craig* v. *Boren*, 429 U.S. 190, 208 n. 22 (1976) (citing statistics on different drinking rates for different ethnic groups).

sumably, men) are forced to subsidize other individuals' risks (presumably, women's) the "subsidizers" will leave the pool, thus occasioning the eventual collapse of insurance schemes. TIAA-CREF Brief at 6 and 26-27. The American Council of Life Insurance predicts unstable rates and a reduction in insurance coverage for all employees, Brief at 3-4, 46-47, as well as the demise of insurance associations, Brief at 46 n. 101, if men leave the insurance pool. *See also* Brief for the Society of Actuaries at 10 n. 6. The adverse selection argument suffers from the same defect as the equity claims. It assumes a condition that in fact does not exist. The practical reality is that individuals, whether employed by the Water Department or by a college or university, do not have the right to select their group. Moreover, refusal to join the group covered by the employer's plan is not in the employee's economic self-interest. *See* note 33 *supra*. There is thus no genuine risk that men will walk out, en masse, of group retirement plans that offer equal take-home pay and retirement benefits to women employees. Just as blacks, smokers, and the obese have not walked away from group plans providing equal benefits for whites, nonsmokers, and the thin, it is fanciful to suppose men will desert plans according equal benefits for women.

In contrast to insurance industry amici's forecasts of massive resistance by male employees, the position of the American Association of University Professors (AAUP), amicus on this brief, is particularly enlightening. AAUP represents many of the university professors who are a major consumer group for the TIAA-CREF plan. AAUP, with its majority male membership, has specifically endorsed equal benefits for men and women under that plan,

and has forecfully urged this position in several elaborative statements. *See, e.g.*, On Equal Monthly Retirement Benefits for Men and Women Faculty, AAUP Bulletin 316 (Winter 1975); Interim Report on Equal Periodic Pension Benefits for Men and Women, AAUP Bulletin 339 (Autumn 1976); D. Halperin, Should Pension Benefits Depend Upon the Sex of the Recipent?, AAUP Bulletin 43 (Spring 1976).

Finally, predictions that employers with largely male work forces will leave insurance plans to become self-insurers, thus occasioning unstable rates, rest on apparent assumptions that employers will violate Title VII by hiring only or mostly men,[35] and on remote and impure speculation. Employers select insurers for a variety of reasons other than pricing factors attributable solely to the sex composition of the covered group. They are interested in, *inter alia*, the soundness of the insurer's financial investments, the funding required of the employer, and any particularly desirable feature for the employer's industry (*e.g.*, the portability of the TIAA-CREF plan, from one university to another, which facilitates mobility among faculty members). In sum, the specter of disaster—the prophecy of rampant adverse selection if women are not paid lower take-home wages or retirement benefits than identically-situated men—has scant basis in fact. Rather, the adverse selection argument layers distortion and speculation.

A further point should be made as to the character of insurers' and employers' reliance on the fact of greater average female longevity. That reliance is indeed a some-

[35] Of course, even employers of all-male work forces must pay for the longevity of those men's spouses, if they offer joint-life options. *See* note 38 *infra*.

times thing. Employers, including the Water Department,[36] have sometimes forced women to retire earlier than men. But if "women live longer than men" is the guiding light, then of course men, not women, should have been singled out for forced early retirement. Under joint-life benefit options, female spouses of male employees sometimes receive *higher* benefits than identically-situated male spouses of female employees.[37] If employers, as the Water Department here,[38] pay the entire cost of the retirement benefit

[36] Affidavit of Alice Muller in Support of Plaintiffs' Motion for Preliminary Injunction (filed Sept. 6, 1974). *See also Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971); *Califano* v. *Webster*, 97 S.Ct. 1192 (1977).

[37] Plaintiffs posed interrogatories to TIAA-CREF in the *Peters* case, note 8 *supra*, on three hypothetical sets of identical but opposite-sex couples: 1) one where the employee was 65 and the spouse 62; 2) one where the employee was 65 and the spouse 65; and 3) one where the employee was 65 and the spouse 67. Plaintiffs asked, as to each set of couples, whether there would be any sex-based differential, under any of TIAA-CREF's joint options, in the amount received by either the employee, or the employee's spouse (after the death of the employee). The reply was yes in almost all instances. Under an option giving a half-benefit to the second annuitant, the male employee received more than the female employee in all three sets of compared couples; similarly, the male employee's *spouse* received more than the female employee's *spouse* in all three sets of compared couples. Under the two-thirds and full benefit to survivor options, the male employee and his spouse each received: 1) less than his/her counterpart in the opposite-sex couple, where the spouse was 62; 2) the same as the counterpart, where the spouse was 65; and 3) more than the counterpart, where the spouse was 67. TIAA-CREF's Answers to Plaintiffs' Interrogatory 3.

[38] The Department stated that there were 727 female *spouses* receiving benefits, as of August 15, 1974, as survivors of male employees who died after retiring from the Department; in contrast, only 13 male spouses were receiving such benefits on the same date. Department's Answers to Plaintiffs' Interrogatories 9a and 11a.

for *spouses*, they pay more for female dependents of men than for male dependents of women, based on the same fact of greater average female longevity. And finally, when employers pay men less for early retirement than identically-situated female employees, and derive support for that practice from the insurance industry's sex-segregated mortality tables, *see* note 9 *supra*, the picture becomes all the more curious.

In conclusion, none of the business purposes advanced in this case qualify as defenses under established Title VII law. The Water Department's own current provision of equal take-home pay and equal retirement benefits indicates the speciousness of the alleged "cost" defense—the only defense relating to the *employer's* business. The remaining insurance concerns—grouping, equity, and adverse selection—on inspection, are revealed as either not under attack, not relevant to group insurance plans, or not based on fact. They should be decisively rejected for what they are: attempts to justify explicit sex discrimination by resort to custom—the long-standing tradition of sex-segregated mortality tables in the insurance industry. It may well be that "habit, rather than analysis," makes the sex line seem "acceptable and natural," where a line based on race, religion or national origin would be recognized as offensive and intolerable. *See Mathews* v. *Lucas*, 427 U.S. 495, 520-21 (1976) (Stevens, J. dissenting) ("Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female . . .; for too much of our history there was the same inertia in distinguishing between black and white."); *Califano* v. *Goldfarb*, 430 U.S. 199, 224 (1977) (Stevens, J. concurring).

C. *The Bennett Amendment Provides No Defense to an Employer Policy of Paying Women Lower Take-Home Wages or Retirement Benefits Than Men.*

Petitioners and supporting amici argue that the part of Section 703(h) of Title VII known as "the Bennett Amendment" provides a defense to the Water Department's violation of Section 703(a). Their argument is threefold. First, they assert that the Bennett Amendment allows use of non-sex-based factors in setting compensation differentials, and that the Water Department's policy of paying women less take-home pay than men is not based on sex, but on longevity. Second, they argue that a Humphrey-Randolph colloquy indicates a Congressional intent to allow discriminatory sex-based classifications in retirement plans. Third, they argue that the Bennett Amendment makes an Equal Pay Act interpretive regulation cited in *Gilbert*, 29 C.F.R. §800.116(d), controlling in Title VII discrimination cases.

All three arguments lack merit. The employer policy here is not based on a "factor other than sex"; it is based explicitly and solely on sex. The Humphrey-Randolph colloquy does not indicate a Congressional intent to allow gender lines which operate to the detriment of women workers. The interpretive regulation, by allowing sex-based differentials in wages, is contrary to the text of the Equal Pay Act and inconsistent with another Equal Pay Act regulation; indeed, the Labor Department itself retreated from the regulation by filing a brief in the Ninth Circuit urging that women were entitled, under the Equal Pay Act, to take-home pay equal to men's. Finally, the relevant EEOC regulations clearly prohibiting the employer practice at issue are entitled to deference under the Court's *Gilbert* standard.

1. Section 703(h) Does Not Provide an Exemption for the Overtly Sex-Based Wage Policy at Issue.

By its express terms and plain meaning, the Bennett Amendment merely incorporates into Title VII the exceptions stated in the Equal Pay Act. The relevant provision of Section 703(h) reads:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer *if such differentiation is authorized by the provisions of Section 206(d) of Title 29* [the Equal Pay Act]. [Emphasis added]

The controlling question, therefore, is what wage differentiation is authorized by the Equal Pay Act. That Act provides:

> *No employer* having employees subject to any provisions of this section *shall discriminate*, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, *except where* such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . . [Emphasis added]

29 U.S.C. §206(d)(1).

This language *prohibits* wage discrimination for equal work up to the point where the "except" clause begins.

The wording following the "except" clause, on the other hand, expressly *authorizes* unequal pay for equal work, to the extent that the differential payment is made pursuant to the enumerated systems or factors. Thus, the Bennett Amendment incorporates into Title VII the explicit Equal Pay Act exceptions, *i.e.*, pay differentials based on seniority, merit, piecework systems, and other non-sex-related factors.[39] An employer policy explicitly based on sex, by definition, cannot be one based on a "factor other than sex."[40]

---

[39] The meager legislative history is in accord. Senator Dirksen explained:

> We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.
>
> *All that the pending amendment does is recognize those exceptions,* that are carried in the basic act. [Emphasis added]

110 Cong. Rec. 13647 (1964). *See Laffey* v. *Northwest Airlines*, —— F.2d ——, 13 FEP Cases 1068, 1078 and n. 104 (D.C. Cir. 1976); *Manhart, supra*, 553 F.2d at 587-588, 590. Senator Bennett, the only other Senator to offer an explanation of the Amendment's meaning prior to its adoption, characterized it as a "proper technical correction of the bill," 110 Cong. Rec. 13647, designed "to provide that in the event of conflict, the provisions of the Equal Pay Act shall not be nullified." *Id.* Senator Humphrey also spoke, saying nothing about what the Amendment meant, but remarking that it was "helpful" and "needed." *Id.* After adoption of the Amendment, he made further remarks, fairly described as confusing. 110 Cong. Rec. 13663-64. See text at pp. 48-51 *infra*.

Senator Bennett's remarks one year later, 111 Cong. Rec. 13359 (July 11, 1965), are not, of course, legislative history. *See* remarks of Senator Clark, one of the floor managers of Title VII, 111 Cong. Rec. 18261-63 (July 26, 1965).

[40] This fourth Equal Pay Act exception was evidently designed to deal with neutral policies which might have a differential impact on women workers, such as a shift differential or a training program under which, in practice, men receive higher wages than women. *See Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974); *Hodgson* v. *Behrens Drug Co.*, 475 F.2d 1041 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973).

The Water Department attempts circumvention by arguing that an explicit policy of paying all women less than all men is simply not based on sex, it is based on longevity.[41] However, it is impossible to hide or disguise the reality that the sole criterion involved is gender *per se*. And, as discussed in I.A. *supra*, sex is a highly imprecise proxy for length of life: the vast majority of men and women can be matched in death ages. Unavoidably, the Department's wage policy is based explicitly and exclusively on sex.

Since Section 703(h) by definition does not authorize explicitly sex-based wage policies, statutory analysis would ordinarily end the inquiry here. However, the Water Department and insurance amici contend that a colloquy between Senators Humphrey and Randolph indicates a Congressional intent to exempt sex-based differentials in retirement plans from the ambit of Title VII. We turn next to that contention.

---

[41] Contrast with Petitioners' Brief at 11-16 the Court's clear understanding in *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974), that the words "any other factor other than sex" mean a factor apart from sex, and surely not a factor explicitly identified by a gender label. The Court, in *Corning*, affirmed a lower court ruling that the pay disparity "was in large part" related to sex, 474 F.2d at 233, and did not serve merely as compensation for night work. So long as the sex factor continued to infect the calculus, the employer could not successfully urge in defense that the practice fell within the exception for "a factor other than sex."

2. The Humphrey-Randolph Colloquy Does Not Indicate a Congressional Intent to Allow Gender Lines Which Operate to the Detriment of Women Workers.

After passage of the Bennett Amendment, Senators Humphrey and Randolph held the following colloquy:

> MR. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota [Mr. Humphrey], who is the effective manager of the pending bill, a clarifying question on the provisions of Title VII.
>
> I have in mind that the *social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not.* These differences in treatment as I recall, are of long standing.
>
> Am I correct, I ask the Senator from Minnesota, in assuming that *similar differences* of treatment in industrial benefit plans, including *earlier retirement options for women*, may continue in operation under this bill, if it becomes law?
>
> MR. HUMPHREY. Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett Amendment; so there can be no doubt about it. [Emphasis added]

110 Cong. Rec. 13663-64 (June 12, 1964).

Senator Humphrey's remarks are best described as confusing. For example, the Senator stated, what plainly is not the law, that the Equal Pay Act allows employers to retire women earlier than men. The Equal Pay Act simply has no

application to differential retirement ages based on sex." By contrast, Title VII unquestionably does prohibit such discrimination. *Bartmess* v. *Drewrys, U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971). Since discussion on the floor of Congress is "generally entitled to little probative weight" in discerning legislative intent, absent clear indications that the speakers are well informed, 2A Sands, Sutherland Statutory Construction, §48.13 at 217 (4th ed. 1973), the Senator's remarks in this context" provide no guidance for the Court.

Second, the Senators seemed concerned with preserving favorable treatment for women (in particular, for women dependents who were either widows or wives of retired men). They did not focus on the question whether sex-

---

" As the Ninth Circuit observed:

> . . . Senator Humphrey's remark reflects an erroneous interpretation of the Equal Pay Act. Because all that the Bennett Amendment did was to incorporate the exemptions of the Equal Pay Act into Title VII, it is questionable whether the Senator's statement, made during the debates on the incorporating statute, would be significant when it erroneously interprets the incorporated statute.

Manhart, supra, 553 F.2d at 590.

" Congress earlier (1956) displayed its awareness of the severely adverse impact on women of early retirement policies employers applied to them, but not to men. To compensate, Congress adjusted the social security benefit calculation formula to favor retired women workers. In 1972, with Title VII on the books, covering the range of private and public sector employment, and outlawing the discriminatory practices that provided the *raison d'etre* for the 1956 sex-specific classification, Congress phased out the social security differential by extending to men the more favorable calculation formerly reserved to women. *See Califano* v. *Webster*, 97 S.Ct. 1192 (1977), and references cited therein.

based lines which penalize women wage earners should be preserved."

However, this Court focused on that precise question, in a decision issued three months after *Gilbert*. In *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), the Court unequivocally rejected attempts to bolster gender lines as favorable to some women (dependent wives or widows) when those same lines in fact penalized women wage earners. Relying on carefully reasoned precedent, *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), the Court in *Goldfarb* invalidated the sex criterion in the very social security provisions cited by Senator Randolph.

If these sex-based classifications and other "similar differences" operate to deprive women wage earners of equal protection, they cannot be valid "factors other than sex" allowed by the Bennett Amendment. For as the Court further stated in *Gilbert*:

---

[44] To the extent that the Senators proffered the Social Security system as a model to be followed, that system now pays equal retirement benefits to men and women; although at the time it accorded women workers a more favorable benefit calculation formula "to compensate women for past economic discrimination." *Califano* v. *Webster*, 97 S. Ct. 1192, 1195 (1977). The Court recognized the validity of that compensatory purpose, noting that even with a more favorable benefit formula, women workers, because of the depressed wages they were paid, received lower average retirement benefits than men ($179.60 per month for men versus $140.50 for women). *Webster* at n.5. The Court explained: "... we have rejected attempts to justify gender classifications as compensation for past discrimination against women when the classifications in fact penalized women wage earners, *Califano* v. *Goldfarb*, ... *Weinberger* v. *Wiesenfeld*, ... or when its legislative history revealed that the classification was not enacted as compensation for past discrimination." 97 S. Ct. at 1194. *See also Lewis* v. *Cohen*, 417 F. Supp. 1047 (E.D. Pa. 1976).

> ... court decisions construing the Equal Protection Clause of the Fourteenth Amendment ... are a useful starting point in interpreting [Title VII].

Gilbert, supra, 429 U.S. at 133. And certainly Title VII's sex discrimination prohibitions are more stringent than those afforded by the guarantee of equal protection. *Washington* v. *Davis,* 426 U.S. 229 (1976).

3. The Wage and Hour Administrator's Interpretive Regulation, 29 C.F.R. §800.116(d), Is Not Entitled to Deference.

The insurance amici's third argument relies on a Labor Department (Wage and Hour Administration) interpretive bulletin, 29 C.F.R. §800.116(d),[45] which purports to authorize sex-based differentials in either the employer contributions for retirement programs, or the employee benefits received under them.[46] That regulation provides:

---

[45] The Water Department relied on this bulletin in the Ninth Circuit but has abandoned the argument before this Court, apparently because the Labor Department submitted a brief below arguing the interpretation was not applicable to this case.

Instead, petitioners argue that the Court should defer to a Labor Department interpretation when it favors defendants, but reject as "weightless" any Department interpretation that favors plaintiffs. Brief at 28-29, 35. This "heads, we win, tails, you lose" position is typical of the view petitioners take in this case.

[46] There is an initial question whether the Equal Pay Act, which is limited to a prohibition on sex-based *wage* differentials, reaches employer contributions to retirement programs or the employee's receipt of benefits under those programs. *See* the Wage and Hour interpretive bulletin, 29 C.F.R. §800.113, stating:

> Study is still being given to some categories of payments made in connection with employment subject to the Act, to determine whether and to what extent such payments are remuneration for employment that must be counted as part of wages for equal pay purposes. These categories of payments include ... *contributions irrevocably made by an*

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees.

29 C.F.R. §800.116(d). Because this Court relied, in part, on the above Wage and Hour Administrator's interpretation in declining to follow the EEOC's pregnancy guideline in *Gilbert,* the supporting amici skip over the plain meaning of the Bennett Amendment and jump directly to the regulation. They baldly assert that the Administrator's interpretation controls this case; they do not explain how a regula-

---

> *employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement,* life, accident, or health insurance or similar *benefits for employees.* [Emphasis added]

The uncertainty this statement reflects evidently stems from the limited purview of the Fair Labor Standards Act, to which the Equal Pay Act was an amendment. *See* 29 U.S.C. §207(e), defining the "regular rate" of pay for purposes of overtime provisions of the FLSA as including:

> . . . all remuneration for employment paid to, or on behalf of, the employee, but *shall not* be deemed to *include*—
>
> . . .
>
> (4) *contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement,* life, accident, or health insurance or similar *benefits for employees.*

The Equal Pay Act does not define the terms "wages" or "wage rates," but the House Committee on Education and Labor, in its report on the bill, stated that "[t]he definitions and interpretations of the Fair Labor Standards Act apply." H.Rep. No. 309, 88th Cong. 1st Sess. (1963), 109 Cong. Rec. 9211.

tion allowing a sex-based factor as a defense squares with an Equal Pay Act exception expressly limited to factors "other than sex."

Amici misconstrue the thrust of the *Gilbert* opinion. First, the central holding of *Gilbert* was that the disability classification at issue was not sex-based at all; rather it was a *neutral* policy. *See Nashville Gas Co.* v. *Satty,* 46 U.S.L.W. 4026 (Dec. 6, 1977). Obviously, in that context, a Labor Department regulation allowing a differential would be based on a "factor other than sex," *i.e.,* pregnancy, and thus would conform to the language of the Equal Pay Act's fourth exception. Second, this Court did not hold that Wage and Hour Administration interpretations were always to be favored over EEOC regulations. It merely found that a portion of a particular EEOC regulation which suffered from a number of defects was not entitled to deference.

In *Gilbert,* the Court referred to the *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944), statement of the role of interpretive rulings:

> The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

In this case, it is the Wage and Hour interpretation which does not merit deference, and the EEOC position which does.

The most conspicuous defect of 29 C.F.R. §800.116(d) is its allowance of explicit sex-based differentials in employer

contributions for retirement plans and in retirement benefits received by employees. In stark contrast, the Equal Pay Act expressly prohibits sex-based differentials, and affords a defense only to employers who establish that a pay disparity is occasioned by a "factor other than sex," *e.g.*, a *bona fide* shift differential, *Corning Glass Co.* v. *Brennan,* 417 U.S. 188 (1974), or training program. *Hodgson* v. *Behrens Drug Co.,* 475 F.2d 1041 (5th Cir.), *cert. denied,* 414 U.S. 822 (1973).

This conflict with the Equal Pay Act is highlighted by a second Labor Department regulation, which is inconsistent with 29 C.F.R. §800.116(d). The second regulation, 29 C.F.R. §800.151, provides:

> A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group does not qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purposes of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility.

Both the Water Department's former policy of paying women lower take-home wages than men and the familiar analogue of paying women lower retirement benefits than men are "based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group . . . ." 29 C.F.R. §800.151. That is, both policies rest on the proposition that the average cost of the same amount of retirement pay will be higher for women as a class than for men as a class, and that this higher cost should be reflected either on the contribution end (by requiring higher contributions from women, as here), or on the benefits end (by providing lower benefits to women). Moreover, under these two policies, "the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex . . .," thus serving "only to perpetuate and promote the very discrimination at which the Act is directed . . . ." 29 C.F.R. §800.151. As discussed in I.A. *supra,* the group cost experience is in fact assessed against the vast majority (84%) of women who will not outlive similarly-situated male co-workers.

The Labor Department is thus committed to two inconsistent approaches. One allows sex-based cost averaging; the other does not. Forced to choose between the two approaches, in the first case raising the conflict, the Labor Department opted for the regulation prohibiting sex-based cost averaging. In the court below, it filed a brief specifically relying on 29 C.F.R. §800.151, without addressing the issue of the continued viability of 29 C.F.R. §800.116(d).

But the conflict remains, and must be resolved by this Court. The proper resolution is the one embraced for this case by the Labor Department below, for 29 C.F.R. §800.151 alone accords with the plain meaning of the Equal Pay Act, its legislative history, and its purpose.

Although there was some discussion during the Congressional hearings on the Equal Pay Act concerning hypothesized greater employment costs of women, Congress specifically rejected an amendment offered by Representative Findley that would have allowed a wage differential "which does not exceed ascertainable and specific added costs resulting from employment of the opposite sex" (109 Cong. Rec. 9217). In urging rejection of Representative Findley's proposed amendment, two of the Equal Pay Act's sponsors indicated that while costs might be a factor under the proposed Act, the employer would have to (1) establish that they were measured under a neutral policy, such as absenteeism, applied alike to all employees, "regardless of sex" (Rep. Goodell, 109 Cong. Rec. 9206, 9217) and, in addition, (2) analyze all costs, including any increase in productivity that would offset alleged greater costs (Rep. Thompson, 109 Cong. Rec. 9207).

Similarly, the Senate Labor Committee rejected any *per se* rule setting up a cost defense for all employers based on one element of cost:

> *This question of added cost* resulting from the employment of women is one that *can be only answered by an ad hoc investigation.* Evidence was presented to indicate that while there may be alleged added costs, these were more than compensated for by the higher productivity of women against men performing the same work and that the overall result for the employer

> was a lesser production cost than would result from the hiring of only men. Furthermore, questions can legitimately be raised as to the accuracy of defining such costs as pension and welfare payments as related to sex. [Emphasis added]

S. Rep. No. 176, 88th Cong., 1st Sess. 4 (1963); 109 Cong. Rec. 8915.

29 C.F.R. §800.116(d) does not meet the stringent standard Congress contemplated for a cost defense. The regulation establishes a *per se* rule for all employers and isolates a single cost element, rather than requiring an "ad hoc investigation" as to each employer. It does not require the employer to analyze *all* costs associated with the employment of men and women, including costs that might be higher for men (*e.g.*, lower productivity, higher susceptibility to disabling injury, higher dependents' costs under fringe benefit programs). And it does not call for a neutral policy, under which *both men and women might receive lower pay* for the higher costs attributable to them, "regardless of sex" (*see* 109 Cong. Rec. 9217, Rep. Goodell); rather, it allows employers to pay women less, solely because of their sex.

Moreover, 29 C.F.R. §800.116(d) violates the central purpose of the Equal Pay Act—raising the depressed economic status of women workers. Declaration of Purposes, Equal Pay Act, Section 2(a)(1), 77 Stat. 56; *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); *Shultz* v. *American Can Co.—Dixie Products*, 424 F.2d 356, 360 (8th Cir. 1970). In contrast, 29 C.F.R. §800.116(d) directly allows employers to provide lower pension benefits for women workers; and, by implication, allows lower take-home wages for women workers.

As Senator Hart said in the debates on the Equal Pay Act:

> We have long passed the time when women were allegedly working for "pin money." Women are working to earn a living, to support families or to contribute to the family's ability to send the children to college —in addition to whatever personal sense of achievement may be involved.
>
> The supermarket does not have a special price on its groceries for women, the doctor does not have a special rate for them, their rent is not based on sex. Why then do we allow a pay differential to continue which gives them a smaller paycheck than others performing the same work?

109 Cong. Rec. 8916 (May 17, 1963). Senator Hart's remarks hold true whether women are current participants in the labor force or retired workers. As the Senate Committee stated in recommending passage of the bill, "The general purchasing power and living standard of workers are adversely affected by discriminatory pay rates." S. Rep. No. 176, *supra*, at 1-2; 109 Cong. Rec. 8914. The purchasing power and living standard of retired women workers, one of the poorest groups in the American economy, Women and Poverty, *supra*, are no less affected by discriminatory pension benefit rates.

In sum, no deference is due 29 C.F.R. §800.116(d) in the context of this case. The Wage and Hour Administrator's interpretation is inconsistent with another Labor Department regulation, and fails to comport with the express language of the Equal Pay Act, its legislative history, and its purpose. "Habit (long-standing among insurers), rather than analysis," appears to account for it. 29 C.F.R. §800.116(d) is not the product of thorough consideration or careful reasoning. It is impossible to harmonize with the general position the Labor Department takes against sex averaging. In short, it reflects none of the factors that give an interpretive ruling "power to persuade."

4. EEOC's Guidelines on Pension Plans Are Entitled to Deference.

The EEOC guidelines on discriminatory retirement plans provide, in relevant part:

> It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex.

29 C.F.R. §1604.9(f). The guidelines further provide:

> It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

29 C.F.R. §1604.9(e).

These guidelines constitute a single, comprehensive, logically-consistent position which fully implements the grand design of Congress in passing and amending Title VII. They suffer none of the defects of the Wage and Hour ruling discussed in the preceding section, nor any of the flaws the EEOC pregnancy guidelines exhibited. Under the *Skidmore* standard set out in *Gilbert*, they possess "power to persuade."

In *Gilbert*, this Court declined to follow a portion of the EEOC pregnancy guidelines in part because the posi-

tion espoused was not a contemporaneous interpretation of Title VII and was contradicted by an earlier Commission position.[47] The Commission's pension plan guidelines, however, are in accord with its earliest position on the issue. Thus, on January 26, 1966—just seven months after Title VII's effective date[48]—the Commission issued a decision finding reasonable cause to believe a sex-discriminatory pension plan violated Title VII. *Rosen* v. *Public Service Electric & Gas Co.*, 409 F.2d 775, 777 and n. 8 (3d Cir. 1969) (quoting the Commission decision). The plan discriminated against men by giving male early retirees smaller benefits than identically-situated female early retirees, solely on the basis of sex. It discriminated against women by forcing them to retire five years earlier than men, solely on the basis of sex. These two policies—differences based on sex in benefits or retirement ages—are precisely the policies forbidden under the Commission's guidelines. 29 C.F.R. §1604.9, 37 Fed. Reg. 6836 (April 5, 1972). *See also* 29 C.F.R. §1604.31(a), 33 Fed. Reg. 3344 (Feb. 24, 1968).[49]

---

[47] *But cf. Nashville Gas Co.* v. *Satty*, 46 U.S.L.W. 4026 (Dec. 6, 1977).

[48] Title VII became effective on July 2, 1965. Pub. L. 88-352, §716(a).

[49] This earlier guideline provided:

(a) A difference in optional or compulsory retirement ages based on sex violates Title VII.

(b) Other differences based on sex, such as differences in benefits for survivors, will be decided by the Commission by the issuance of Commission decisions in cases raising such issues.

33 Fed. Reg. 3344 (Feb. 24, 1968).

Nor has the Commission taken inconsistent positions on sex-discriminatory retirement plans.[50] Indeed, it has issued a steady stream of decisions declaring inconsistent with Title VII both retirement age and benefit differentials based on sex. *See* quoted Decision, *Rosen, supra* (1-26-66) (age and benefits); Case No. YNY 9-034, CCH EEOC Decisions ¶6050 (6-16-69) (age and benefits for survivors); Case No. YNY 9-027, 1 FEP Cases 921 (7-3-69) (age); Decision No. 70-45, CCH EEOC Decisions ¶6041, 2 FEP Cases 166 (7-18-69) (age); Decision No. 70-75, CCH EEOC Decisions ¶6049, 2 FEP Cases 227 (8-13-69) (age); Decision No. 70-706, CCH EEOC Decisions ¶6149, 2 FEP Cases 684 (4-20-70) (age); Decision No. 71-562, CCH EEOC Decisions ¶6184, 3 FEP Cases 233 (12-4-70) (age and benefits); Decision No. 71-1102, CCH EEOC Decisions ¶6200, 3 FEP Cases 271 (12-31-70) (age); Decision No. 71-1580, 3 FEP Cases 812 (4-8-71) (age and benefits for survivors); Decision No. 72-0702, CCH EEOC Decisions ¶6320, 4 FEP Cases 316 (12-27-71) (age); Decision No. 72-1919, CCH EEOC Decisions ¶6370, 4 FEP Cases 1163 (6-6-72) (benefits); Decision No. 74-118, 2 CCH EPG ¶6431 (4-26-74) (benefits); Decision No. 75-020, 11 FEP Cases 1496 (9-4-74) (benefits); Decision No. 75-147, CCH EEOC Decisions ¶6447, 11 FEP Cases 1486 (1-13-75) (age and benefits).

---

[50] Some amici cite a July 1966 opinion letter of an EEOC General Counsel adopting the general approach of 29 C.F.R. §800.116 (d). This isolated opinion of a General Counsel does not have the same status as decisions or regulations issued by the full Commission, and indeed was directly contrary to the prior Commission guidelines, still in effect in July 1966, which listed the Equal Pay Act regulations EEOC would follow as 29 C.F.R. §*800.119-800.163* (thereby specifically excluding 29 C.F.R. §800.116(d)). *See* 29 C.F.R. §1604.7(b), 30 Fed. Reg. 14928 (Dec. 2, 1965), discussed at p. 62 *infra*. Finally, the General Counsel opinion is no longer published, and has not been cited or discussed in any previous case.

Some amici have tried to construct a change in EEOC's position on retirement plans from an earlier Commission regulation on the effect of the Bennett Amendment, 29 C.F.R. §1604.7, 30 Fed. Reg. 14928 (Dec. 2, 1965). However, in this early regulation, the Commission specifically declined to follow the Labor Department regulation set forth at 29 C.F.R. §800.116(d):

> . . . the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, *Part 800.119-800.163.* [Emphasis added]

29 C.F.R. §1604.7(b). Since the Commission never deferred to 29 C.F.R. §800.116(d), its issuance of a series of decisions and guidelines over the years, all disapproving sex-based lines in retirement plans, whatever the proffered rationale, surely demonstrates consistency, not a change in position. The Commission elaborated and formalized its position over the years; it did not change that position. Thus, the Commission's position on discriminatory retirement plans reflects and builds upon EEOC's early construction of the Act, and exhibits none of the inconsistencies that shroud the Labor Department regulations. Deference is therefore due to EEOC's informed judgment.

In conclusion, the Bennett Amendment provides no refuge for the Water Department or its insurance industry amici. It supplies no defense to a discriminatory wage policy explicitly based on "gender as such." Of the two conflicting Labor Department regulations pertinent to this case, only 29 C.F.R. §800.151 is entitled to deference; it

alone conforms to the express language and purpose of the Equal Pay Act. Finally, the EEOC guidelines on pension plans are fully entitled to deference. They embody a single, comprehensive, logically-consistent position anchored solidly to the purpose of Title VII—that women should not be pigeonholed or lumped together because of their sex, nor should they be deprived "of protection for [themselves and] their families which men receive as a result of their employment." *Goldfarb, supra.*

II.

The decision below accords with this Court's principal equal protection/gender classification decisions.

Sex-averaging arguments strikingly similar to those pressed here were firmly rejected in last Term's principal equal protection/gender classification decisions, *Craig* v. *Boren,* 429 U.S. 190 (1976), and *Califano* v. *Goldfarb,* 430 U.S. 199 (1977). Those decisions may well be "a useful starting point in interpreting [Title VII]." *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 133 (1976). Indeed, to the extent Title VII calls for review more stringent than the Constitution requires, *see Washington* v. *Davis,* 426 U.S. 229 (1976), the rulings in *Craig* and *Goldfarb* should make this an *a fortiori* case.

In *Craig* v. *Boren,* the statute at issue, prohibiting sale of beer to 18–21-year-old boys, was intended to foster traffic safety. Just as death dates for most people are not predictable in advance, so there was "no apparent way to single out persons likely to drink and drive." 429 U.S. at 227 (Rehnquist, J. dissenting). Therefore, Oklahoma used

sex as a proxy. Based on statistics indicating "young males pose by far the greater drunk driving hazard, both in terms of sheer numbers and in terms of hazard on a per-driver basis," 429 U.S. at 226 (Rehnquist, J. dissenting), the State permitted girls to purchase beer at an earlier age than boys.

The Court acknowledged that the statistical disparities shown in *Craig* were "not trivial." Nonetheless, given the elevated level of scrutiny appropriate to sex-based differentials, the Court held Oklahoma's statistical analyses "hardly can form the basis for employment of a gender line as a classifying device." 429 U.S. at 201.[51]

Califano v. *Goldfarb* further developed the point made in *Craig*, that gender, like race, must not be used as a proxy for some other characteristic, attribute or condition. *Goldfarb* involved the Social Security Act's resort to the gender label "widow" as a surrogate for "surviving dependent spouse." An unusually high correlation between gender and the trait gender purported to represent was advanced in *Goldfarb*. As Justice Rehnquist, in dissent, calculated, the correlation was approximately 90 percent. 430 U.S. at 238 n.7. The 90 percent "fit" urged in *Goldfarb* was rejected by the Court as justification for use of a sex

[51] Justice Rehnquist's dissenting opinion justifies a permissive approach to sex classification in the *Craig* setting, in substantial part, on the ground that only classifications *disadvantaging women* require, under the Court's precedent, "elevated" scrutiny. 429 U.S. at 219. Here, we have such a classification. Though most women and men live the same length of time, *i.e.*, the vast majority of men and women born the same year may be paired by death age, *see I.A. supra*, sex-averaging yields a distinct advantage to the male pensioner and a distinct disadvantage to the female pensioner.

criterion. In contrast, the classification here misfits some 84 percent of the affected population.

In sum, the classification in controversy is "based upon gender as such," *Geduldig* v. *Aiello*, 417 U.S. 484, 496 n.20 (1974); there is at best a highly imperfect congruence between gender and the trait at issue; decisions "analyzing and discussing"[52] categorization by gender in an equal protection context cast in grave doubt the brand of sex averaging practiced by petitioner Water Department.[53] Given these factors, the Title VII result should be apparent: under the close review Congress commanded, the Water Department's policy, ranging men and women in two separate lines, must fall.

[52] *See General Electric Co.* v. *Gilbert*, 429 U.S. 125, 133 (1976).

[53] Amici TIAA-CREF (Brief at 18) misread this Court's 1971-1977 precedent. In none of the cases TIAA-CREF cite did the Court assert the absence of "any basis in fact" for the classification. On the contrary, the proposition in *Reed* v. *Reed*, 404 U.S. 71 (1971), that men have more business experience than women, had ample empirical support. In *Frontiero*, 411 U.S. 677 (1973), *Wiesenfeld*, 420 U.S. 636 (1975), and *Goldfarb*, 430 U.S. 199 (1977), statistics tendered by the Government fully documented men's non-dependency and their labor-market orientation. And it is ludicrous to suggest that this Court relied upon any potential for individualized testing of beer drinking capacity in reaching its decision in *Craig* v. *Boren*, 429 U.S. 190 (1976).

III.

Congressional authority under Section 5 of the Fourteenth Amendment and the Commerce Clause plainly supports application of Title VII's ban on sex classification to the case at bar.

Petitioners' constitutional argument (Brief at 37-46) are framed in utter disregard of the legislative history of the 1972 amendments to Title VII, and this Court's relevant precedent. In extending the coverage of Title VII, Congress asserted its authority under both the Commerce Clause and Section 5 of the Fourteenth Amendment. *See, e.g.,* S. Rep. No. 92-415, 92d Cong., 1st Sess. 11 (1971). Congressional intent was expressed explicitly: the amendments bringing governments, government agencies and political subdivisions within Title VII were designed to afford to public employees "the same benefits and protections in equal employment as the employees in the private sector of the economy." S. Rep. No. 92-415, 92d Cong., 1st Sess. 9 (1971).

Beyond question, the post-Civil War amendments enlarge the powers of Congress, *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 454 (1976), make Congress, not the judiciary, the chief guardian of protected rights, *Ex parte Virginia,* 100 U.S. 339, 345 (1879), and permit legislation independent of a judicial finding that official action denies equal protection of the laws. *Compare South Carolina* v. *Katzenbach,* 383 U.S. 301, 333-34, 337 (1966), *with Lassiter* v. *Northhampton County Bd. of Elections,* 360 U.S. 45 (1959). It is for Congress to decide what legislation is necessary and proper in the exercise of its powers under either the Commerce

Clause or Section 5 of the Fourteenth Amendment, and the congressional choice of appropriate means for exercising those powers—so long as the selected means are not elsewhere prohibited by the Constitution—should not be overturned by the judiciary. *McCulloch* v. *Maryland,* 4 Wheat. 316, 421 (1819); *Katzenbach* v. *Morgan,* 384 U.S. 641, 650 (1966). "Attributes of [state] sovereignty" insulated from federal interference under this Court's decision in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), surely do not include the prerogative to discriminate on the basis of sex. *See, e.g., Usery* v. *Allegheny County Institution District,* 544 F.2d 148 (3d Cir. 1976), *cert. denied,* 430 U.S. 946 (1977); *Usery* v. *Bettendorf Community School District,* 423 F. Supp. 637 (S.D. Iowa 1976). *See generally* Calhoun, The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Discrimination, 61 Minn. L. Rev. 313 (1977).

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

RUTH BADER GINSBURG
SUSAN DELLER ROSS
KATHLEEN WILLERT PERATIS
MARJORIE MAZEN SMITH
BRUCE J. ENNIS
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

MATTHEW W. FINKIN
General Counsel
American Association of
University Professors
Southern Methodist
University School of Law
Dallas, Texas 75275

Attorneys for the American Civil Liberties Union Foundation and the American Association of University Professors as Amicus Curiae

December, 1977

APPENDIX

Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 670165

MILDRED PETERS, *et al.*,

Plaintiffs,

—v.—

WAYNE STATE UNIVERSITY, *et al.*,

Defendants.

ORDER

Defendant having filed a motion for summary judgment and it appearing to the court that plaintiffs contend that their proofs will demonstrate that the defendant's use of mortality tables to administer its retirement program affords women lower benefits than men and, therefore, is discriminatory and violative of Title VII of the 1964 Civil Rights Act; and it further appearing that plaintiffs assert that appropriate statistical data will demonstrate that while generally women may die later than men, working women do not have greater longevity than working men and further that although the average non-working woman may live longer, most women and men live the same length of time; and it further appearing that plaintiffs also seek to demonstrate that defendant may use other non-discriminatory life expectancy predictors in the administration of its retirement program, namely, health, smoking or other com-

mon characteristics; and it further appearing that plaintiffs herein are entitled to develop these factual issues in support of their theory of discriminatory effect precluding disposition on summary judgment; and it further appearing to the court that neither the Bennett Amendment nor *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976) requires disposition of the factual issues on summary judgment;

Accordingly, IT IS ORDERED that defendant's motion for summary judgment be and the same hereby is denied.

/s/ ROBERT E. DEMASCIO
Robert E. DeMascio
United States District Judge

Dated: September 21, 1977